

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,084

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 19 1965

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO; and their agents, SYSTEM DIVISION No. 87, THE ORDER OF RAILWAY TELEGRAPHERS AND BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition to Review a Decision and Order
of the National Labor Relations Board

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Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition to Review a Decision and Order
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JOINT APPENDIX

[150 NLRB No. 37]

Decision and Order

Upon charges duly filed on September 12 and 13, 1963, by B. B. McCormick and Sons, Inc., Houdaille-Duval Company, and Blount Brothers Corporation, herein collectively referred to as the Charging Parties, the General Counsel for the National Labor Relations Board, herein called the General Counsel, by the Regional Director for the Twelfth Region, issued a complaint dated April 28, 1964, and amended on May 11, 1964, and June 29, 1964, against International Brotherhood of Electrical Workers, AFL-CIO; International Association of Machinists, AFL-CIO; Sheet Metal Workers International Association, AFL-CIO; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO; and their agents, System Division No. 87, The Order of Railroad Telegraphers, and Brotherhood of Maintenance of Way Employees, herein collectively called the Respondents, alleging that the Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Sections 8(b)(4)(i)(ii)(B) and 2(6) and (7) of the Act. Copies of the complaint, and the charges were duly served upon the Respondents and the Charging Parties.

The complaint alleged, in substance, that from on or about September 11, 1963, Respondents engaged in or induced or encouraged individuals employed by the Charging Parties and other persons engaged in commerce or in an industry affecting commerce to engage in a strike, or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services, and had threatened, coerced, and restrained the Charging Parties, National Aeronautical Space Administration (herein called NASA), U. S. Army Corps of Engineers (herein called Corps of Engineers), U. S. Air Force, and other persons engaged in commerce or in an industry affecting commerce with an object of forcing or requiring

NASA, the Corps of Engineers, the U. S. Air Force, the Charging Parties, and other persons engaged in commerce or in an industry affecting commerce, to cease doing business with Florida East Coast Railway Company (herein called FEC).

Thereafter, on June 8, 1964, General Counsel, Respondents and one of the Charging Parties, Blount Brothers Corporation, entered into a stipulation with an addendum dated July 17, 1964, setting forth an agreed statement of facts. The other two Charging Parties subsequently indicated their willingness to have the cases decided upon the basis of the stipulation. The stipulation provides that the parties waive their right to a hearing, to the issuance of a Trial Examiner's Decision, and to the filing of exceptions. The stipulation also provides that the entire record of the proceedings shall consist of the stipulation, the charge, the complaint, the amended complaint, affidavits of service of the charges and complaints, and Respondents' answer to the complaint as amended. It further provides that upon such stipulation and the record herein provided and on the receipt of briefs from the parties, the Board may make findings of fact and conclusions of law, and may issue its Decision and Order. The parties requested oral argument before the Board.¹

By an order issued June 15, 1964, the Board approved the aforesaid stipulation, made it a part of the record herein, and transferred the case to the Board.

Upon the basis of the aforesaid stipulation, and the entire record in the case, including the briefs filed by the parties, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANIES INVOLVED

A. B. B. McCormick and Sons, Inc., is engaged at the Merritt Island Launch Area at Merritt Island, Florida

¹ The request for oral argument is hereby denied as the stipulation and briefs of the parties fully present the issues and the positions of the parties.

(herein called MILA), in the building and construction of various facilities pursuant to contracts with the Corps of Engineers. In the operation of its business at MILA, B. B. McCormick and Sons, Inc., annually receives goods and materials from outside the State of Florida valued at more than \$50,000 for use at the MILA construction projects.

B. Houdaille-Duval Company is engaged at MILA in the building and construction of various facilities pursuant to contracts with the Corps of Engineers. In the operation of its business at MILA, Houdaille-Duval Company annually receives goods and materials from outside the State of Florida valued at more than \$50,000 for use at the MILA construction projects.

C. Blount Brothers Corporation is engaged at MILA in the building and construction of various facilities pursuant to contracts with the Corps of Engineers. In the operation of its business at MILA, Blount Brothers Corporation annually receives goods and materials from outside the State of Florida valued at more than \$50,000 for use at the MILA construction projects.

We find that B. B. McCormick and Sons, Inc., Houdaille-Duval Company, and Blount Brothers Corporation are, and at all times material herein have been, engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE LABOR ORGANIZATIONS INVOLVED

The complaint alleges that Respondents International Brotherhood of Electrical Workers, AFL-CIO (herein called IBEW); International Association of Machinists, AFL-CIO (herein called IAM); Sheet Metal Workers International Association, AFL-CIO (herein called Sheet Metal Workers); and International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (herein called Boilermakers) are each labor

organizations within the meaning of Section 2(5) of the Act. The answer denies these allegations. This is one of the major contested issues of the case.

The complaint also alleges that Respondents System Division No. 87, The Order of Railroad Telegraphers (herein called Telegraphers), and Brotherhood of Maintenance of Way Employees (herein called Maintenance of Way Employees) have acted as agents of Respondents IBEW, IAM, Boilermakers, and Sheet Metal Workers within the meaning of Sections 2(13) and 8(b) of the Act. In their answer Respondents deny that Telegraphers and Maintenance of Way Employees are, or have acted as, agents of the other named Respondents. Thus the agency status of these two organizations is also a contested issue in this proceeding.

III. THE UNFAIR LABOR PRACTICES

A. The Picketing Incidents

Eleven nonoperating unions² represent the nonoperating employees of the FEC. In connection with the 1961 contract reopening, these 11 unions which included all the Respondents, formed a single organization herein called the Cooperating Organizations, for the purpose of presenting a united front in their collective-bargaining effort with the FEC and other railroads. Under the sponsorship of the Cooperating Organizations, members served identical reopening demands upon these railroads, including the FEC. By June 5, 1962, the Cooperating Organizations had agreed

² These unions are: Brotherhood of Maintenance of Way Employees; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of Railroad Signalmen; The Order of Railroad Telegraphers; Hotel and Restaurant Employees' and Bartenders' International Union; International Association of Machinists; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; Sheet Metal Workers International Association; Brotherhood Railway Carmen of America; International Brotherhood of Electrical Workers; and International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

on terms of a new national contract with all Class I railroads other than the FEC. The FEC, which had not participated in the national negotiations, refused to be bound by the terms of this agreement. Separate negotiations were fruitless.

On January 23, 1963, the Cooperating Organizations called a strike against the FEC which resulted in the placement of pickets along the FEC mainline. The picketing was extended to the Cape Kennedy-MILA area on September 11-12, 1963. The present dispute involves only the picketing of the Cape Kennedy-MILA area.

The Cape Kennedy-MILA area is really two peninsulas running south and separated from the mainland by the Indian River. MILA and Cape Kennedy are separated by the Banana River which is shaped like a bay. Florida Route 402 runs from Titusville on the mainland to the Atlantic and except where it crosses the Indian River runs due east-west. The main spur of the FEC runs parallel to Route 402 ending at Wilson which is about half way across the peninsula. At Wilson two spurs run off the main spur, the west spur to MILA and the east spur to Cape Kennedy. Running parallel to the east spur is Florida Route 401 which ends at the north gate of Cape Kennedy. Also at Wilson, Florida Route A1A running south bisects Route 402, goes through MILA and then crosses the Banana River south of Cape Kennedy at Cocoa Beach. About 5 miles north of where Route A1A crosses the Banana River, Florida Route 528 runs east from the mainland to the south gate of Cape Kennedy.

The September 11-12 picketing occurred at two points in the MILA area, one south of Wilson where a siding spur leaves the west spur, and the other about nine miles further south on Route A1A. These two points are indicated, respectively, as I and II on the map attached to this decision as Appendix A.

The pickets carried signs which read as follows:

NOTICE TO THE PUBLIC
F.E.C.R.R. WHOSE
FACILITIES ARE TRANSPORTING
TO THIS PROJECT REFUSES TO
BARGAIN IN GOOD FAITH.
SYSTEM DIVISION NO. 87,
ORDER OF RAILROAD TELEGRAPHERS.
WE HAVE NO QUARREL WITH ANY
OTHER EMPLOYER.

On February 9, 1964, NASA issued a press release which said that FEC had been invested with authority to operate the newly constructed west spur, such operation to begin on the morning of February 10, 1964. On February 10 and 11, 1964, picketing was resumed with the same picket signs at location II and at 5 additional locations marked IIA, III, IV, V, and VI on Appendix A. The picketing continued until the morning of February 12, 1964, when it was halted by reason of a temporary restraining order issued by a United States District Court.

Point IIA is two miles south of point II and is opposite a direct road leading to a construction project where employees of a secondary employer were engaged in work for the Corps of Engineers. A picket at IIA cannot be seen from the FEC tracks or the spur line. Point III is located at the intersection of highway A1A and U. S. Route 1 and is near the North Gate leading to Merritt Island and Cape Kennedy. A picket at Point III cannot be seen from the FEC tracks or the spur line. Point IV is where the FEC main spur to Cape Kennedy and MILA leaves the FEC mainline. A picket at this point can be seen by trainmen from both the main FEC track and the FEC spur line at the point where it joins the main track. Point V is on highway 402 just over the causeway across the Indian River leading to MILA and Cape Kennedy. A picket at

this point cannot be seen from the main track, but may be seen from the spur track looking down the Indian River. Point VI is on the highway near the South Gate to Cape Kennedy. A picket at VI cannot be seen from the FEC main tracks or the spur. In sum, pickets were visible from FEC property only at point IV. FEC employees did not work at or in the vicinity of the pickets located at points II, IIA, III, V, and VI.

On June 8-10, 1964, picketing was resumed at points II, IIA, III, V, and VI until again enjoined by the United States District Court. The signs read:³

NOTICE TO PUBLIC
F.E.C.R.R. WHOSE
FACILITIES ARE TRANSPORTING
TO THIS PROJECT REFUSES TO
BARGAIN IN GOOD FAITH BRO'D
MAINTENANCE OF WAY EMPL.
LOCALS 2020 717. WE HAVE NO
QUARREL WITH ANY OTHER EMPLOYERS.

All persons entering Cape Kennedy and MILA during these periods had to pass a picket. As a result of the picketing, employees working for neutral contractors doing construction work or operating facilities at MILA and Cape Kennedy, among them employees of the Charging Parties, refused to cross the picket lines to perform services for their respective employers.

B. The Issues

The complaint alleges that by authorizing, establishing, and maintaining the aforesaid pickets Respondents have induced individuals employed by neutral employers to engage in a strike or a refusal to perform services with an object of forcing such neutral persons to cease doing busi-

³ On June 8, 1964, the earlier picket sign was used at point II.

ness with NASA, the Corps of Engineers, and the U. S. Air Force, and to force NASA, the Corps of Engineers, the U. S. Air Force, and other neutral persons to cease doing business with FEC, in violation of Section 8(b)(4)(i)(ii)(B) of the Act. Respondents defend on two theories: (1) when representing individuals employed by companies subject to the Railway Labor Act, they are not labor organizations as defined in Section 2(5) of the National Labor Relations Act and so are not subject to any of the subsections of Section 8(b) of that Act; and (2) even if they are "labor organizations," the picketing engaged in was primary and therefore legal.

C. The Character of the Picketing

We defer for the moment consideration of the status of Respondents as "labor organizations" to determine whether the picketing was otherwise illegal. Respondents contend that the picketing conformed with the criteria enunciated by the Board in the *Moore Drydock* case⁴ and was therefore lawful. In *Moore Drydock*, the Board said that in a mixed situs situation, picketing of the premises of the secondary employer harboring the situs of the dispute is lawful where: (a) the picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picket signs disclose clearly that the dispute is with the primary employer.

Respondents' labor dispute was solely with FEC, which is the primary employer. The situs of that dispute was the FEC property and tracks, owned or operated by FEC. But Respondents' picketing was not limited to such locations, the situs of the primary dispute. Instead, most of the

⁴ *Sailors' Union of the Pacific (Moore Drydock Co.)*, 92 NLRB 547, 549.

picketing occurred at points on public highways removed and not visible from FEC tracks and not utilized by FEC personnel. The picketing appeal at such locations could only have been directed at employees of neutral employers unconnected with the FEC dispute or FEC operations, which employers are employers within the meaning of the Act. In fact this was the sole effect of the picketing: employees of neutral employers refused to cross the picket lines set up on public highways and operations of these employers were shut down or hampered. It is not determinative, therefore, that the picket signs advertised that the dispute was solely with the FEC. We hold that the picketing away from the FEC property was secondary and unlawful.

D. The Applicability of the Act to Respondents

Having found that the character of picketing was not such as to constitute lawful primary picketing immunized from the scope of 8(b)(4)(B), we shall now consider the status of Respondents and their agents under the Act. We take up first the question of whether the Respondents are labor organizations within the meaning of Section 2(5) of the Act.⁵

⁵ Section 2(5) defines a "labor organization" as:

... any organization of any kind ... in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Section 2(3) defines an "employee" as:

... any employee ... but shall not include ... any individual employed by an employer subject to the Railway Labor Act

Section 2(2) states:

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include ... any person subject to the Railway Labor Act

1. The Status of Respondents IAM, IBEW, Boilermakers, and Sheet Metal Workers

Respondents Boilermakers, IAM, IBEW, and Sheet Metal Workers are predominantly non-railway labor unions. Each has, however, a substantial number of members working for railroads, varying from 4,000 for the Boilermakers, to 48,000 for the IAM. The proportion of railroad workers to total membership of these unions varies from 21½ percent to 8 percent. Railway employees are organized by these Respondents into separate locals and, except for the Boilermakers, are supervised by an international vice-president whose jurisdiction is basically limited to railway employees and matters. The railway employees who are members of these unions vote on all union matters in the same manner as other members of each of the unions.

In *International Organization of Masters, Mates and Pilots of America (Chicago Calumet Stevedoring Co., Inc.)*,⁶ the respondent international union, whose membership was composed predominantly of supervisors, and the respondent local, whose membership comprising pilots was entirely supervisory, engaged in secondary picketing activities against foreign shipowners to compel them to use the services of pilot members of the local. The Board there held that both the international union and its local had unlawfully engaged in secondary boycott activities, notwithstanding that such activities were in support of individuals who were not statutory employees and of a labor union—the local—which was not a statutory labor organization. The Board found that the international was a “labor organization” because a small number of its total membership, about 2 percent, who, however, were not involved in the dispute, were statutory “employees.” The Board also found the local, although not a statutory “labor organization” because its membership was entirely supervisory,

⁶ 125 NLRB 113, remanded to the Board and modified, 144 NLRB 1172 and 146 NLRB No. 19.

jointly responsible for the illegal secondary activity as an agent of the international. The Board regarded as immaterial the fact that the individuals immediately involved in the dispute were not "employees." This conclusion is supported by the opinion of the Court of Appeals in *National Marine Engineers v. N.L.R.B.*,⁷ where the court said:

We do not believe the question of whether MEBA and MMP are "labor organizations" that may be guilty of unfair labor practices should be decided by looking only at the workers of S & S. We think that the determination whether a labor union charged with an unfair labor practice under 8(b) is a "labor organization" turns on whether "employees" participate in the organization charged and that, if they do the union is a "labor organization" although all the workers of the particular employer whom it is seeking to represent are "supervisors" and therefore not "employees."

• • • • •

There is no inconsistency in looking to the identity of the workers of the particular employer when the issue is whether an election must be held or who may vote in it . . . but to the entire composition of the union being charged, local or national, when the issue is whether it is a "labor organization" and therefore guilty of an unfair labor practice. The questions arise under different sections of the statute, with different wording and purposes.

The membership of Respondents IAM, IBEW, Boilermakers, and Sheet Metal Workers is comprised overwhelmingly of non-railroad employees. They are unquestionably, therefore, in their overall capacity "labor organizations" and the Board has so held in numerous cases.

⁷ 274 F. 2d 167, 173 (C.A. 2). Cf. *Engineers Ass'n v. Interlake Steamship Co.*, 370 U. S. 173, 179-180.

There is no legislative history to support Respondents' contention that an international union which represents railroad and non-railroad employees is exempt from the provisions of Section 8(b)(4) when it engages in otherwise prohibited secondary activity against "any person engaged in commerce" within the meaning of the Act, in support of a strike against a railroad. As we have indicated above, both the Board and the courts have by clear implication decided to the contrary. It is true that in the *Paper Makers* case,⁸ the Board said that if a railroad union engaged in secondary boycott activity in support of a strike against a railroad it would not be in contravention of Section 8(b)(4) because a railroad labor union is not a "labor organization." But in so saying, the Board was considering only a railway labor union whose membership was made up entirely of railroad workers and not one which, as here, includes both railroad and non-railroad workers.

It is also true that in the *DiGiorgio* case,⁹ the Board and the Court of Appeals for the District of Columbia, dismissed secondary boycott allegations against a local union whose membership consisted only of "agricultural laborers" on the ground that the local union was not a "labor organization" despite the fact that the national union with which it was affiliated was a "labor organization" whose members included workers other than "agricultural laborers." However, in *DiGiorgio*, unlike here, both the Board and the court found that the local union was not an agent of the national union, which was not named a party respondent. In the present case, on the contrary, the national unions which are named respondents are clearly "labor organizations," and it is these national unions which acted through their agents, the respondent railroad labor unions, to picket the secondary employers.

⁸ *Local 833, UAW (Paper Makers Importing Co)*, 116 NLRB 267.

⁹ *DiGiorgio Fruit Corp. v. N.L.R.B.*, 191 F. 2d 642, 647 (C.A.D.C.).

Accordingly, we find that Respondents IAM, IBEW, Boilermakers, and Sheet Metal Workers are "labor organizations" subject to the provisions of Section 8(b)(4)(B) with respect to their conduct directed against secondary employers engaged in commerce within the meaning of the Act. This is so although Respondents' primary dispute was with an employer subject to the Railway Labor Act and whose employees are not "employees" under the National Labor Relations Act.¹⁰

2. Responsibility for the Picketing and the Status of Respondents Telegraphers and Maintenance of Way Employees

Respondents IBEW, IAM, Boilermakers, and Sheet Metal Workers contend that they are not principals for whom the picketing unions, Telegraphers and Maintenance of Way Employees were acting as agents. We disagree.

As noted above, the Cooperating Organizations, which included in its membership all Respondents, as a group decided to strike the FEC. As part of such strike action Cooperating Organizations set up a "subcommittee," designated the master strike team, to direct and coordinate all strike action. Each member of the Cooperating Organizations furnished personnel to carry on the picketing. The master strike team in turn set up local strike teams at various geographic points on the FEC lines to arrange for picketing and other strike action in these local areas. The master strike team included representatives of Telegraphers and Maintenance of Way Employees. The local strike teams at Fort Pierce, Florida, and New Smyrna Beach, Florida, those directly involved in the picketing which is the subject of this proceeding, included international representatives of the Sheet Metal Workers and the Boilermakers.

¹⁰ Cf. *N.L.R.B. v. Washington-Oregon Shingle Weavers District Council*, 211 F. 2d 149, 152 (C.A. 9).

Prior to September 11, 1963, the signs carried by pickets indicated merely that nonoperating employees were on strike. Thereafter the picket signs contained the name of either Telegraphers or Maintenance of Way Employees as the sponsoring organization. The pickets at MILA and Cape Kennedy who carried the "Telegraphers" signs were placed by the local strike teams; the pickets who carried the "Maintenance of Way Employees" signs were placed by one of that union's officials who was a member of the local strike team. The master strike team at all material times had final authority and control over and was kept fully advised of all the picketing. The chairman of Cooperating Organizations was aware of the "Telegraphers" and "Maintenance of Way Employees" picketing prior to and during its occurrence.

Where two or more unions engage in a strike as a joint venture, each is responsible for the conduct of other members of the joint venture and of agents of each other in pursuit of the common aim.¹¹ In this case, all Respondents were members of Cooperating Organizations which called and managed the strike against FEC in their common behalf. That organization, through its master and local strike teams, had final control of and authority over all the picketing. Pickets were actually placed and supervised by members of the local strike teams. Although picket signs used after September 11, 1963, carried the names of either Telegraphers or Maintenance of Way Employees as sponsor of the picketing, it is apparent, and we find, that these pickets were acting in behalf of all the striking unions and in furtherance of their common objective to win the strike against the FEC. We further find that the pickets were the agents, not only of Telegraphers and Maintenance of Way Employees, but of the other Respondents, who were members of Cooperating Organizations.

¹¹ *International Brotherhood of Pulp, Sulphite and Paper Workers (Solo Cup Company)*, 144 NLRB 421; *Master, Mates, & Pilots (Chicago Calumet Stevedoring Co.)*, *supra*.

Section 8(b) proscribes conduct by a "labor organization or its agents." Respondents IAM, IBEW, Boilermakers, and Sheet Metal Workers are, as found above, "labor organizations" and as such responsible for the conduct of the pickets. Telegraphers and Maintenance of Way Employees are not, however, "labor organizations" because their membership includes only individuals employed by employers who are subject to the Railway Labor Act and who therefore are not "employees." Although not "labor organizations" these two unions were "agents" of "labor organizations" in their picketing inasmuch as such picketing was in pursuance of the joint venture.¹² We find, therefore, that as "agents" of "labor organizations," Respondents Telegraphers and Maintenance of Way Employees are jointly responsible with the other Respondents under the Act for the illegal picketing activity.

We further find that the picketing of the MILA and Cape Kennedy sites away from tracks either owned or operated by FEC, had as an object to induce work stoppages by employees of neutral persons to force NASA, Corps of Engineers, U. S. Air Force, and other neutral persons to cease doing business with FEC, thereby violating Section 8(b)(4)(i)(ii)(B).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondents set forth in Section III, above, occurring in connection with the operations of the Employers set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening commerce and the free flow of commerce.

¹² *International Organization of Masters, Mates and Pilots of America, (Chicago Calumet Stevedoring Co., Inc.), supra; National Marine Engineers v. N.L.R.B., supra.*

V. THE REMEDY

Having found that Respondent Unions have violated Section 8(b)(4)(i)(ii)(B) of the Act, as set forth above, we shall order them to cease and desist from such conduct and take certain affirmative action designed to effectuate the policies of the Act. Telegraphers and the Maintenance of Way Employees will be bound by such an order to the extent that they may act as agents of the other Respondents.

VI. CONCLUSIONS OF LAW

1. International Brotherhood of Electrical Workers, AFL-CIO; International Association of Machinists, AFL-CIO; Sheet Metal Workers International Association, AFL-CIO; and International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

2. System Division No. 87, The Order of Railroad Telegraphers and Brotherhood of Maintenance of Way Employees are agents of the above-named labor organizations within the meaning of Section 8(b) of the Act.

3. The above-named labor organizations and the above-named agents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) by inducing and encouraging individuals employed by B. B. McCormick and Sons, Inc., Houdaille-Duval Company, Blount Brothers Corporation and other persons engaged in commerce or in an industry affecting commerce within the meaning of the Act to engage in a strike or a refusal in the course of their employment to perform services, and by threatening, coercing, or restraining persons engaged in commerce or in an industry affecting commerce with an object of forcing or requiring B. B. McCormick and Sons, Inc., Houdaille-Duval Company, Blount Brothers Corporation and other persons to cease doing business with NASA, Corps of Engineers, and U. S. Air Force, and to force NASA, Corps

of Engineers, U. S. Air Force and other persons to cease doing business with Florida East Coast Railway Company.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, the Board hereby orders that Respondents International Brotherhood of Electrical Workers, AFL-CIO; International Association of Machinists, AFL-CIO; Sheet Metal Workers International Association, AFL-CIO; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO; their officers, agents, and representatives, including their agents System Division No. 87, The Order of Railroad Telegraphers and Brotherhood of Maintenance of Way Employees, shall:

1. Cease and desist from inducing or encouraging any individual employed by B. B. McCormick and Sons, Inc., Houdaille-Duval Company, Blount Brothers Corporation, or by any other person engaged in commerce or in an industry affecting commerce, other than Florida East Coast Railway Company, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining B. B. McCormick and Sons, Inc., Houdaille-Duval Company, Blount Brothers Corporation, or any other person engaged in commerce or in an industry affecting commerce where in either case an object thereof is to force or require the aforesaid persons to cease doing business with National Aeronautical Space Administration, U. S. Corps of Engineers, and U. S. Air Force, and thereby to force National Aeronautical Space Administration, U. S. Corps of Engineers, U. S. Air Force and other persons to cease doing business with Florida East Coast Railway Company in violation of Section 8(b)(4)(i)(ii)(B) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Each Respondent shall post, in conspicuous places in the business offices and meeting halls of those of its locals which have members who work for Florida East Coast Railway Company and at all other places where notices to such members are customarily posted, copies of the notice appended hereto as Appendix B.¹³ Copies of said notice to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by Respondents' authorized representatives, be posted by Respondents immediately upon receipt thereof and be maintained by them for 60 consecutive days. Reasonable steps shall be taken by Respondents to insure that such notices, are not altered, defaced, or covered by any other material.

(b) Furnish said Regional Director for the Twelfth Region signed copies of the aforesaid notice for posting by B. B. McCormisk and Sons, Inc., Houdaille-Duval Company, and Blount Brothers Corporation, if willing, at places where they customarily post notices to their employees.

(c) Notify the Regional Director for the Twelfth Region, in writing, within 10 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated, Washington, D. C.

Frank W. McCulloch, *Chairman*

Boyd Leedom, *Member*

John H. Fanning, *Member*

Gerald A. Brown, *Member*

NATIONAL LABOR RELATIONS BOARD

(Seal)

¹³ In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Member Jenkins, dissenting:

I cannot accept the conclusion of the majority that this Board has jurisdiction over a labor dispute (specifically the picketing attendant thereto) between a railway and its employees.

First, the fundamental fact is that the dispute involved herein is simply a strike (and picketing) against the Florida East Coast Railway by various unions representing non-operating railway employees who are subject to the Railway Labor Act. It is incongruous, at the least, to acknowledge that strikers, labor disputes, and the gamut of labor relations activities that occur between railway employees and railroads are within the exclusive province of the Railway Labor Act, and the detailed and extensive procedures set up under the National Mediation Board, but nevertheless to assert that the picketing herein falls within the jurisdiction of this Board.¹⁴ The statute we administer explicitly excludes employees "subject to the Railway Labor Act" and individuals employed by an employer subject to the Railway Labor Act," and to avoid any incongruity, it is necessary only that the Board apply this exclusion here and decline jurisdiction.¹⁵

Second, the application of the Section 8(b)(4) provisions to the Respondents constitutes a clearly disparate application because this Board does not and cannot apply the Section 8(a) provisions against employers subject to the Railway Labor Act.

In *DiGiorgio Fruit Corp. v. N.L.R.B.*, 191 F. 2d 642, (C.A. D.C.) cert denied, 324 U.S. 877, the Court discussed whether a farm union constituted a labor organization within the meaning of the Act and concluded that because the Kern County Local was composed of agricultural laborers, they were excluded from coverage of the Act even though the National Farm Labor Union of which it was a part had in it commercial packing house employees and

¹⁴ Cf. *Local 833, UAW (Paper Makers Importing Co.)*, 116 NLRB 267.

¹⁵ The majority apparently concedes, as it must, that the Florida East Coast Railway and its employees are not "employers" or "employees" as defined in Section 2(2) and 2(3) of our Act.

others who were not directly involved in the dispute and who were employees within the meaning of the Act. In discussing agricultural laborers the Court discussed railroad workers as an analagous situation stating:

The Board also supports its view by an analogy to the exclusion of railroad workers from the definition of "employees." Section 2(3) of the Act [defining employee] . . . was inserted in 1947 and the Senate Report upon that bill stated:

The exemption of employees of employers subject to the Railway Labor Act is to make it perfectly clear that in providing remedies for unfair labor practices of unions and their agents it was not intended to include such employees. 13 Sen. Report No. 105, 80th Cong., 1st Sess. 19(1947) (191 F. 2d 642 at 646)

The Court likewise concluded that the term "labor organization" in Section 8(a) and Section 8(b) must be uniformly interpreted, pointing out that:

The incongruity and conflict resulting from giving the term "employees" its statutory defined meaning, excluding agricultural employees but at the same time giving the term "labor organization" a non-statutory meaning so as to include agricultural laborers throughout Section 8(b), is emphasized by the Board. Moreover, the Board point out that Section 8(a) which makes illegal an unfair practice by employers and thus bestows rights and benefits on employees uses the term "labor organization" throughout. We think that the section conferring benefits (Section 8(a)), which are subdivisions of the same section of the Act, must be construed in harmony; and that if they be construed to apply to organizations of agricultural laborers, they would nullify the exclusion of such laborers from the statutory definition of "employees." (191 F. 2d 642 at 647.)

Such rationale is directly applicable to the railway employees here.

Third, I cannot base jurisdiction, as my colleagues do, on the fact that Respondent Unions IBEW, IAM, Boilermakers, and Sheet Metal Workers also have locals (not here involved) that contain "employees," employed by "employers" subject to our Act, who thus fall within the definition of our Act. The individuals involved in the dispute here are clearly employees of a railway, their dispute is with the railway, and they are therefore subject to the Railway Labor Act. To regard the separately employed, nondisputing and non-participating locals, connected with the disputants only through the International Union, as somehow converting the railway locals and employees into a "labor organization" under this Act is to engage in a fiction. Presumably, under the rationale of the majority, this Board will henceforth intervene in railway and airline labor disputes whenever anyone can show that the International Union involved also has members employed by employers subject to our Act; indeed, the International Union could control the application of the statute by acquiring or severing such members.

Consequently, the extension of jurisdiction here is not only unwise but sets a risky precedent for the future. This risk is more than speculative, for the majority has rested jurisdiction partly on the ground that the secondary employers picketed are subject to our Act. Such result amounts to a roving commission for the Board to set aright all *types* of misconduct condemned by our Act, without regard to the limits on the Board's jurisdiction.

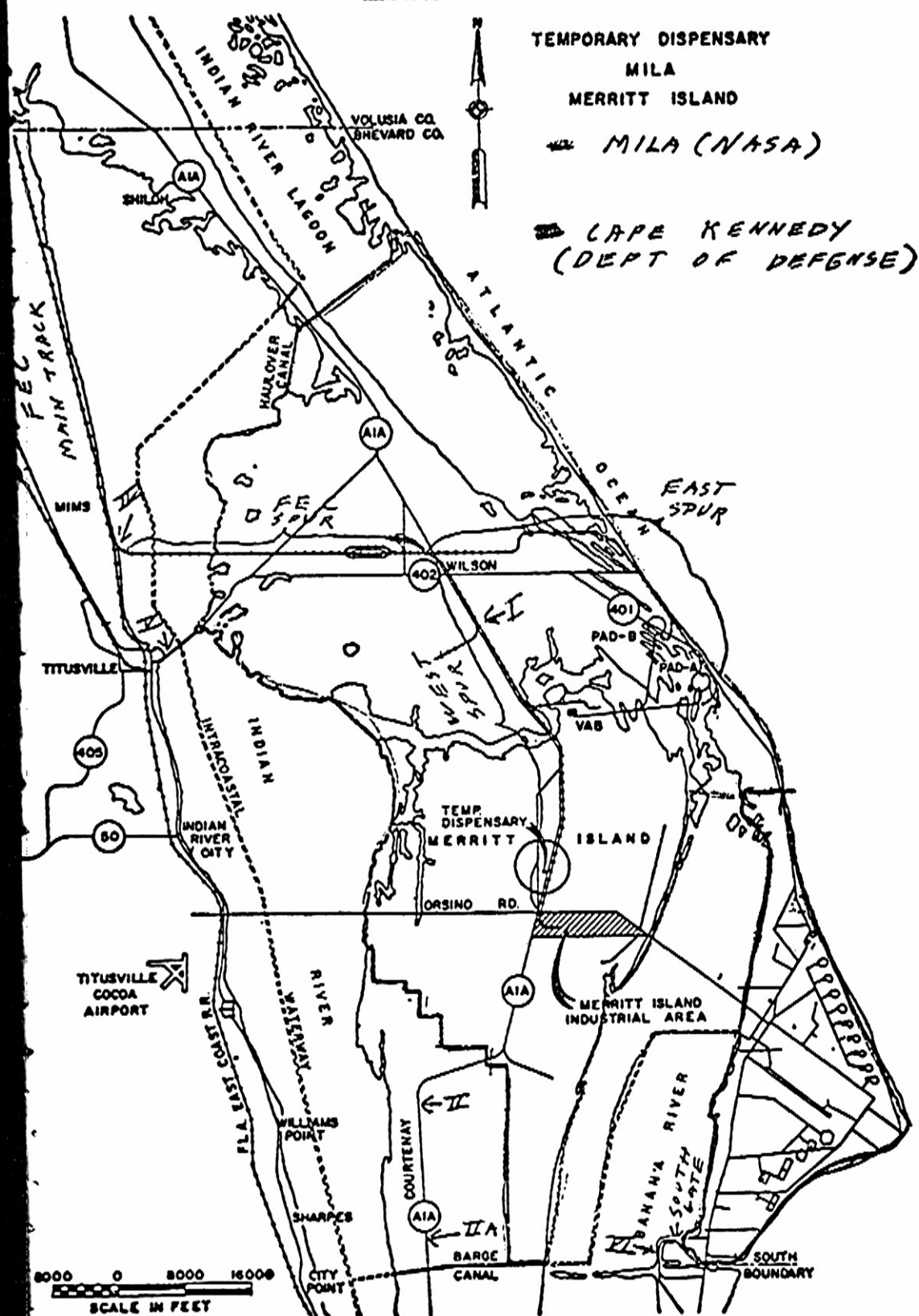
In view of the explicit statutory exclusion of railroad employers and their employees from our Act and the fact that application of the Section 8(b) provisions would result in a disparate application of only a part of the major provisions of our Act, I find no basis for the assertion of jurisdiction here.

Dated, Washington, D. C.

Howard W. Jenkins, *Member*

NATIONAL LABOR RELATIONS BOARD

APPENDIX A



APPENDIX B

NOTICE

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT induce or encourage individuals employed by the B. B. McCORMICK AND SONS, INC., HOUDAILLE-DUVAL COMPANY, BLOUNT BROTHERS CORPORATION, or any other persons engaged in commerce or in industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle, or work on any goods, articles, materials, or commodities or perform services, or threaten, restrain, or coerce said employers or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require the aforesaid persons to cease doing business with National Aeronautical Space Administration, U. S. Corps of Engineers, and U. S. Air Force, and thereby to force National Aeronautical Space Administration, U. S. Corps of Engineers, U. S. Air Force and other persons to cease doing business with FLORIDA EAST COAST RAILWAY COMPANY in violation of Section 8(b) (4)(i)(ii)(B) of the Act.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

(Labor Organization)

Dated By
(Representative) (Title)

INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO

(Labor Organization)

Dated By
(Representative) (Title)

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, AFL-CIO

(Labor Organization)

Dated By
(Representative) (Title)

INTERNATIONAL BROTHERHOOD OF BOILER-
MAKERS, IRON SHIPBUILDERS, BLACK-
SMITHS FORGERS AND HELPERS, AFL-CIO

(Labor Organization)

Dated By
(Representative) (Title)

SYSTEM DIVISION No. 87, THE ORDER OF
RAILROAD TELEGRAPHERS

(Labor Organization)

Dated By
(Representative) (Title)

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

(Labor Organization)

Dated By
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 706 Federal Office Building, 500 Zack Street, Tampa, Florida 33602, Tel. No. 228-7711.

Stipulation of Facts

I. PRELIMINARY STATEMENT

1. Comes now Richard H. Frank, attorney for Respondents in the above-captioned matter and Blount Brothers Corporation, one of the Charging Parties, and counsel for the General Counsel, being all the parties to this preceeding, and hereby move the Board, in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay to exercise its powers under Section 102.50 of the Rules and Regulations of the National Labor Relations Board, Series S, as amended, and to transfer this proceeding to the Board.

2. The parties agree that the Charges, Complaint, Answer and this "Stipulation of Facts" constitute the entire record in the case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulate that they waive notice of hearing and hearing before a Trial Examiner, the making of Findings of Facts and Conclusions of Law by a Trial Examiner, and the issuance of a Trial Examiner's Decision And Recommended Order; and desire to submit this case to the Board for Findings of Facts, Conclusions of Law, and Decision and Order.

3. This Stipulation is made without prejudice to any objection that any party may have as to the materiality or relevancy of any fact stated herein.

4. Respondents respectfully request an opportunity to present oral argument to the Board.

II. JURISDICTIONAL FACTS

5. The charges are attached as Exhibits 1, 2 and 3. The charges marked 1, 2 and 3 respectfully were served on Respondents.

6. B. B. McCormick and Sons, Inc. (herein called McCormick) is engaged at the Merritt Island Launch Area at

Merritt Island, Florida (herein called MILA), in the building and construction of various facilities pursuant to contracts with the United States Army Corps of Engineers (herein called Corps of Engineers). In the operation of its business at MILA, McCormick receives goods and materials from outside the State of Florida valued at in excess of \$50,000.00 for use at the MILA construction projects.

7. Houdaille-Duval Company (herein called Duval) is engaged at MILA in the building and construction of various facilities pursuant to contracts with the Corps of Engineers, and in the operation of its business at MILA, Duval annually receives goods and materials from outside the State of Florida valued at in excess of \$50,000.00 for use at the MILA construction projects.

8. Blount Brothers Corporation (herein called Blount) is engaged at MILA in the building and construction of various facilities pursuant to contracts with the Corps of Engineers. In the operation of its business at MILA, Blount annually receives goods and materials from outside the State of Florida valued at in excess of \$50,000.00 for use at the MILA construction projects.

9. Corps of Engineers has contracts with various contractors in the building and construction industry, an industry affecting commerce, for the purpose of constructing various launch facilities at MILA and at Cape Kennedy, Florida, for the use of NASA and the U. S. Air Force.

10. The Florida East Coast Railroad (herein called FEC) has a contract with NASA to construct, operate and maintain spur tracks leading onto MILA and Cape Kennedy.

11. Contractors, including McCormick, Duval, Blount and others working at MILA and Cape Kennedy, utilize the services of FEC in shipping goods and materials to MILA and Cape Kennedy.

12. McCormick, Duval, and Blount are employers within the meaning of Section 2(2) of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et. seq.* (herein called the Act).

III. FLORIDA EAST COAST RAILWAY COMPANY

13. The FEC operates a Class I railroad between Jacksonville, Florida and Miami, Florida.

14. Prior to 1961, FEC was in receivership and/or trusteeship. The history of the reorganization of FEC is summarized in *St. Joe Paper Co., et al. v. Atlantic Coast Line Railway Co.*, 347 U.S. 298 and *In Re Florida East Coast Railway Co.*, 171 Fed. Supp. 512.

15. Prior to the present strike, the FEC employed approximately 2,000 people in the various classifications of work and skill commonly associated with the operation of a Class I Railroad.

IV. THE ESTABLISHMENT OF COLLECTIVE BARGAINING RELATIONSHIPS BETWEEN THE FEC AND ELEVEN NON-OPERATING RAILWAY LABOR ORGANIZATIONS

A. Shop-Crafts

16. On August 11, 1934, a document entitled AGREEMENT TO PROVIDE FOR HOLDING SECRET BALLOT TO DETERMINE THE RIGHT TO REPRESENT MECHANICAL EMPLOYEES (SHOP) FLORIDA EAST COAST RAILWAY was executed by a representative of the FEC, a representative of the incumbent company union, Florida East Coast Railway Shopmen's Union, and a representative of the Florida East Coast Federation No. 69 Railway Employees Department—American Federation of Labor (hereinafter referred to as System Federation No. 69), (Exhibit 4). The agreement called for elections in two classifications designated "group (a)" and "group (b)".

17. On that same day, August 11, 1934, a MEDIATION AGREEMENT was executed between the FEC and System Federation No. 69, wherein it was agreed that the Signatory parties would be bound by the results of an election to be held on August 27, 1934 (Exhibit 5).

18. Thereafter, on August 27, 1934, a secret ballot election was held and System Federation No. 69, received a majority of the ballots cast in both group (a) and group (b). System Federation No. 69 was on that same day certified as having won the election and that it was the "duly authorized representative of the group (a) Mechanical Employees (Shop) of the Florida East Coast Railway . . . for the purposes of the Railway Labor Act" (Exhibit 6), and also as the "duly designated representative of the group (b) Mechanical Employees (Shop) of the Florida East Coast Railway . . . for the purposes of the Railway Labor Act" (Exhibit 7). Finally, on September 14, 1934, nine roadway shop employees also designated System Federation No. 69 as their collective bargaining representative in dealing with the FEC (Exhibit 8).

19. By agreement dated September 22, 1934, System Federation No. 69 and the FEC continued in effect the collective bargaining agreement executed between the FEC and the former company union (Exhibits 9 and 10).

20. The most recent complete agreement is dated May 1, 1953 (Exhibit 11). Since May 1, 1953, supplemental agreements dealing with specific items have been agreed upon but such agreements are not included in Exhibit 11. Exhibits 12 through 16 are the latest complete agreements between the FEC and the non-operating unions other than the shop-craft unions.

B. Non-operating Unions Other Than The Shop-Crafts

21. Four non-operating unions other than the shop-craft railway organizations were certified by the National Media-

tion Board as collective bargaining representatives for employees employed by FEC at various times from 1935 to 1941 (Exhibits 17 through 20). The fifth such union, the Order of Railroad Telegraphers, had been recognized by the FEC prior to 1935.

V. THE DISPUTE BETWEEN THE FEC AND ELEVEN RAILWAY LABOR ORGANIZATIONS

22. On September 1, 1961, each of the eleven non-operating unions involved in the dispute with the FEC served a Section 6 notice, as required by the Railway Labor Act (45 U.S.C. 151, 156), upon the FEC management.

23. The eleven disputing unions together are designated as the Eleven Cooperating Railway Labor Organizations. They are as follows:

- (1) Brotherhood of Maintenance of Way Employees.
- (2) Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.
- (3) Brotherhood of Railroad Signalmen.
- (4) The Order of Railroad Telegraphers.
- (5) Hotel and Restaurant Employees' and Bartenders' International Union.
- (6) International Association of Machinists.
- (7) International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.
- (8) Sheet Metal Workers International Association.
- (9) Brotherhood Railway Carmen of America.
- (10) International Brotherhood of Electrical Workers.
- (11) International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

24. The organizations from (6) through (11) are the shop-craft unions. The organizations from (1) through (5) are the non-operating unions other than the shop-craft unions. The Section 6 notices served by each of the eleven organizations was in a standardized form and the desired wage and work rule changes were uniform i.e. 25¢ wage increase and 6 months advance notice in reduction in force (Exhibits 21 and 22). Exhibit 22 was sent to the general chairman of the eleven involved unions. Exhibit 21 was in a form prepared by the eleven cooperating labor organizations and then transmitted by the unions to their respective general chairman. Similar Section 6 notices were served by each of the five non-operating unions other than the shop-craft unions. Each Section 6 notice asked the FEC to participate in national handling by joining with other carriers in the creation of a carriers' national conference committee.

25. The Section 6 notice served upon the FEC management by the six shop-craft unions is attached as Exhibit 21.

26. The Section 6 notice (Exhibit 21) referred to above, was in conformity with instructions contained in Circular No. 2441 issued by the Railway Employees' Department of the AFL-CIO (Exhibit 23). Identical Section 6 notices were sent to all other class 1 railroads in the country by each of the eleven disputing labor organizations.

27. Prior to September 1, 1961, the chief executives of the eleven disputing unions formed a committee and joined together in connection with the 1961 wage and work rule movement and as such designated themselves the Eleven Cooperating Railway Labor Organizations (hereinafter called the Cooperating Organizations). The Cooperating Organizations were formed to present a united collective bargaining effort. It was the Cooperating Organizations that determined the demands expressed in the Section 6 notices of September 1, 1961. Mr. G. E. Leighty was ap-

pointed Chairman of the Cooperating Organizations, and in this capacity he serves as the main spokesman for the Cooperating Organizations in seeking to resolve wage and rule movement disputes, such as the instant FEC dispute.

28. On September 18, 1961, the FEC responded to the Section 6 notices with counter-proposals consisting of a 20 percent reduction in wages and 24 hours advance furlough notice.

29. The first meeting between the FEC management and the shop-craft unions was held on September 28, 1961. Present for the unions were:

Lee Haley, General Chairman, International Association of Machinists; Mr. Haley was also Secretary-Treasurer of System Federation No. 69.

Mr. T. B. Steadman, General Chairman of District Council No. 8, International Brotherhood of Boiler-makers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers.

Mr. R. L. Lanier, General Chairman of the District Council No. 42, Sheet Metal Workers International Association.

Mr. R. M. Cooke, President, System Federation No. 69; Mr. Cooke is also General Chairman of Local Lodge 487, Railway Carmen of America.

Mr. R. A. Hooker, General Chairman of Local 888, International Brotherhood of Electrical Workers.

Mr. L. L. Taylor, General Chairman, International Brotherhood of Firemen, Oilers, Helpers, Round-house and Railway Shop Laborers.

Mr. R. G. Smith, Vice President of Brotherhood Railway Carmen of America.

30. On or about September 26, 1961, the FEC management met separately with representatives of the five non-operating unions other than the shop-craft unions.

31. The FEC notified the shop-craft unions and System Federation No. 69, on February 7, 1962, that it would not participate in national handling of the dispute and that it would bargain independently of all other carriers. The five non-operating unions other than the shop-craft unions were individually notified of the same decision.

32. By the 5th of June 1962, a national agreement, consistent with the recommendations of Presidential Emergency Board No. 145, was reached between the Eleven Cooperating Railway Organizations and all the Class 1 railroads in the country which participated in the national negotiations (Exhibit 24). The FEC, however, had not participated in national handling and refused to agree to the terms of the national agreement which provided a wage increase of 10.28¢ per hour and five days advance notice of reduction in force.

33. On July 27, 1962, the National Mediation Board assigned a mediator to the FEC dispute at the request of Mr. Leighty. Thereafter, meetings were held on August 20, 21, 22, and 23, 1962, and September 4, 1962.

34. Beginning with the August 20, 1962 meeting, representatives of all the Eleven Cooperating Railway Labor Organizations met with the FEC and James M. Holaren of the National Mediation Board. The unions were represented as follows (Exhibit 25):

J. D. Bearden, Vice Grand President, Brotherhood of Railway Clerks. Mr. Bearden was the spokesman at the meeting on August 20, 21, 22 and 23, 1962.

J. H. Hadley, Vice President, Brotherhood of Maintenance of Way Employees.

C. L. Winstead, General Chairman, Brotherhood of Maintenance of Way Employees.

W. F. Howard, General Chairman, Brotherhood of Railway Clerks.

Allan J. Buckley, Grand Lodge Representative, International Association of Machinists. He also represented Railway Employees' Department.

R. W. McDougall, General Chairman of District Council No. 16, International Association of Machinists.

Frank Jackson, Dining Car Employees Local 351.

T. B. Steadman, General Chairman of District Council No. 8, International Brotherhood of Boiler-makers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers.

J. E. Dubberly, Brotherhood of Railroad Signalmen of America.

R. M. Cooke, General Chairman of Local Lodge 487, Railway Carmen of America.

I. E. Hamilton, General Chairman, System Division 87, The Order of Railroad Telegraphers.

J. L. Christiansen, General Chairman, International Brotherhood of Firemen and Oilers.

C. A. Dupont, General Chairman of Local 888, International Brotherhood of Electrical Workers.

R. L. Lanier, General Chairman of District Council No. 42, Sheet Metal Workers International Association.

35. At the August 20th meeting the FEC asked to bargain separately with the eleven disputing organizations. The eleven organizations insisted that the FEC bargain

with them jointly since they had all served identical Section 6 notices and they had all received identical responses from the FEC. The union representatives signed a document summarizing the matters discussed (Exhibit 26). At the meetings held on August 22 and 23, 1962, the same union representatives were present. On September 4, 1962, another meeting was held again attended by the same union representatives with the exception that Allan J. Buckley was not present and R. G. Smith, who represented the Railway Employees' Department and J. C. Goodson, Assistant General Chairman, Brotherhood of Maintenance of Way Employees, were present.

36. A meeting was held on December 5, 1962, in the offices of the National Mediation Board in Washington, D. C. The union representatives present were:

G. E. Leighty, President, The Order of Railroad Telegraphers, and Chairman of the Eleven Cooperating Railway Labor Organizations, who was the spokesman at this meeting.

Harold Crotty, President, Brotherhood of Maintenance of Way Employees.

Glenn Atkinson, Vice President, Brotherhood of Railway Clerks, etc.

Thomas Ramsey, Vice President, International Brotherhood of Electrical Workers.

Michael Fox President, Railway Employees Department.

J. D. Bearden, Vice President, Brotherhood of Railway Clerks, etc.

T. H. Gregg, Vice President, Brotherhood of Railroad Signalmen of America

Joseph Ramsey, Vice President, International Association of Machinists.

James O. Zink, Vice President, International Brotherhood of Firemen and Oilers.

C. A. Darnell, Vice President, Sheet Metal Workers International Association.

37. On January 16, 1963, the Eleven Cooperating Organizations reached a decision to strike the FEC and to initiate picketing at 6:00 a.m. on the 23rd of January, 1963 (Exhibit 27). These decisions were made at a meeting in Washington, D. C. Among those who attended were:

G. E. Leighty, President, The Order of Railroad Telegraphers, and Chairman of the Cooperating Organizations.

Michael Fox, President, Railway Employees' Department.

Robert L. Lanier, General Chairman of District Council 42 of the Sheet Metal Workers International Association.

J. W. O'Brien, Vice President, Sheet Metal Workers International Association.

T. B. Steadman, General Chairman of District Council No. 8, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers.

Eric Erickson, Representative of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers.

Edward Wolf, Vice President, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers.

Robert McDougall, General Chairman of District Council 16, International Association of Machinists.

Joseph W. Ramsey, Vice President, International Association of Machinists.

R. M. Cooke, President, System Federation No. 69.

A. J. Bernhardt, President, Brotherhood of Railway Carmen of America.

H. C. Crotty, President, Brotherhood of Maintenance of Way Employees.

Thomas Ramsey, Vice President of International Brotherhood of the Electrical Workers.

38. On January 21, 1963, a telegram sent by G. E. Leighty, as Chairman of the Cooperating Organizations, to the National Mediation Board advised that the employees represented by the Eleven Cooperating Organizations would commence a strike on January 23, 1963 on the FEC Railroad.

39. Each of the Cooperating Organizations participated in the strike and each of the organizations furnished personnel to carry on the picketing. A master strike team was designated. It consisted of Mr. J. H. Hadley, a vice president of the Brotherhood of Maintenance of Way Employees; Mr. O. C. Jones, vice president of The Order of Railroad Telegraphers; Mr. R. G. Smith, vice president of the Brotherhood Railway Carmen of America; Mr. T. H. Gregg, vice president of the Brotherhood of Railroad Signalmen and Mr. J. D. Bearden of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. In addition to the master strike team there were six local strike teams responsible for the picketing at particular sections of the FEC system. Various International Representatives were assigned to these local strike teams. Mr. L. A. Darnell, an International Representative of the Sheetmetal Workers was assigned to the Ft. Pierce strike teams. Mr. T. D. Lyons, an International Representative of the Boilermakers and

Blacksmiths and Mr. W. B. O'Connell, an International Representative of the Brotherhood of Railroad Signalmen were assigned to the New Smyrna Beach, Florida, strike team. Mr. O'Connell was appointed Chairman of the New Smyrna Beach strike team. Pickets were established at various points along the FEC system. Prior to September 11, 1963, the picket signs at all points bore the legend:

NON-OPERATING
EMPLOYEES
A.F.L.-CIO
F.E.C. RY
ON
STRIKE
(Exhibit 28)

Mr. T. B. Steadman, Mr. R. L. Lanier, Mr. R. W. McDougall and Mr. C. A. Dupont were not active in the picketing. Mr. O. C. Jones had overall supervision of the picketing.

40. Another meeting between the unions and FEC was held on January 30, 1963. At that meeting present were Wycoff of the FEC and J. H. Hadley for the Eleven Co-operating Organizations, accompanied by Mr. O. C. Jones. Hadley is a vice president of the Maintenance of Way, and Jones is vice president of The Order of Railroad Telegraphers.

41. The next meeting was March 15, 1963. The FEC earlier had stated that it believed it could settle the strike if only the general chairmen were present, and at the March 15 meeting, therefore, only the general chairmen attended. The same was true of a meeting held May 10, 1963. On July 24, 1963, the following persons were present: G. E. Leighty, president, The Order of Railroad Telegraphers, and chairman of the Cooperating Organizations who was the spokesman at this meeting; Mr. Michael Fox, president of Railway Employees Department, AFL-

CIO, Mr. C. L. Dennis, grand president, Brotherhood Railway and Steamship Clerks, Freight Handlers; Mr. H. C. Crotty, president, Brotherhood of Maintenance of Way Employees; Mr. A. J. Bernhardt, general president, Brotherhood Railway Carmen of America. On December 7, 1963, another meeting was held. Representing the unions was Mr. G. E. Leighty, accompanied by his attorney. The meetings were held in the offices of Mr. Edward Ball at the Florida National Bank Building, Jacksonville, Florida. The St. Joe Paper Company also has offices in that building.

42. On November 9, 1963, the President appointed an Emergency Board to investigate the FEC dispute. The National Mediation Board notified Mr. G. E. Leighty of the creation of the Board and requested that the unions halt the strike (Exhibit 29). Mr. Leighty replied by wire (Exhibit 30).

VI. COMPOSITION, ORGANIZATION AND FUNCTION OF THE RAILWAY EMPLOYEES' DEPARTMENT AND SYSTEM FEDERATIONS

A. Railway Employees' Department, AFL-CIO, and System Federations

43. All of the eleven non-operating unions involved in the FEC dispute are members of and affiliated with the American Federation of Labor-Congress of Industrial Organizations. The six non-operating shop-craft unions comprise the Railway Employees' Department (herein referred to as the RED). The international labor organizations affiliated with RED are represented by their chief officials on its Executive Council as follows:

Russell K. Berg, President, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers.

A. J. Bernhardt, President, Brotherhood Railway Carmen of America.

Gordon M. Freeman, President, International Brotherhood of Electrical Workers.

A. J. Hayes, President, International Association of Machinists.

Edward F. Carlough, President, Sheet Metal Workers International Association.

Anthony E. Matz, President, International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

The executive officers of the RED are Michael Fox, President, and Howard Pickett, Secretary-Treasurer.

44. The RED assists in looking after the interests of over three hundred thousand railway shop employees represented by its six affiliated international organizations in the railroad industry. The RED was formed to enable these organizations to cooperate on matters of mutual interest.

45. While organized primarily by the mechanical trades organizations, it was the aim of the constitution adopted by the Railway Employees' Department in 1912 to "bring within this organization all railway employees," and at one time or another the organizations representing Clerical and Station employees, Telegraphers, Switchmen and Maintenance of Way Employees have been affiliated with the RED.

46. The employees represented by the six organizations affiliated with the RED work in the railway shops, roundhouses and yards on the railroads throughout the United States and Canada. They build, maintain, service, inspect and repair railway rolling stock, including steam and diesel electric locomotives, passenger cars and freight cars, operate heating and stationary power plants and perform other skilled work on the railways.

47. The RED carries on a wide range of activities. It is active in the fields of organizing, collective bargainings, legislation, apprentice training and the protection of job opportunities.

48. The various mechanical trades organizations began to form voluntary System Federations on the individual railroads with the sanction of their International Officers. By 1908, the sentiment for closer affiliation had grown to such an extent that in that year a tentative organization of the RED was approved by the American Federation of Labor at its Denver Convention. The organization of the RED was completed later and its first convention was held in Chicago in January 1909.

49. The RED constitution attached as Exhibit 31 provides for a delegate convention every four years at which matters of interest to the railway employees are considered. Officers are also elected consisting of a president and secretary-treasurer who administer the affairs of the Department between conventions together with the Executive Council which is composed of the chief executives of the affiliated organizations. An organization chart of the RED is attached as Exhibit 32.

50. The plan of organization which was adopted and has been followed by the RED is designed to guarantee every member representation and to preserve craft autonomy, while at the same time, providing for joint action. Moreover, just as the affiliated international organizations cooperate at the national level through the RED, the District Councils, Locals, Lodges and Joint Protective Boards of the various unions on each railroad system cooperate through the System Federations. The local lodges of the respective organizations cooperate at the various shop points on the railroad through the local federations that are composed of local craft organizations.

51. Similarly, the system federations on the various railroads hold conventions periodically, usually every two

years, to elect officers and consider problems of interest to the employees they represent. System federations do not, however, pay dues or per capita to the RED. The president, vice president and secretary-treasurer constitute the officers of the system federation, and together with its executive board, composed of the general chairmen of the component organizations on the property, carry on the business of the system federation. With help and guidance from the RED, the system federations conduct negotiations with the railway management, settle grievances, and carry on other activities to improve the working conditions of the employees and protect their welfare. Rather than dissipate efforts through conflicting policies, the affiliated organizations adopt and follow uniform policies.

52. Generally the functions of the RED are those which would ordinarily have to be performed by each of its affiliated international organizations and they are essentially those which can be handled on behalf of all the organizations to their mutual advantage. Organizing, for example, is one field in which the RED has been historically most active. By consolidating the efforts of its affiliated organizations, it has been possible to secure maximum utilization of the personnel furnished by the respective international organizations to this work. Not only has this resulted in more effective organization of the unorganized, but such cooperation has been particularly valuable to the smaller crafts whose resources are somewhat limited.

53. When representation is established, the RED generally directs the activities leading to the establishment of contractual relations with the carrier. After a contract has been negotiated and executed, all proposed revisions affecting more than one of the crafts are approved by the RED before a Section 6 notice is served on the management by the general chairmen, through the system federation, to change the agreement. When a revision is limited to a

particular craft it is handled only by representatives of the International of that craft, although it is brought to the attention of the RED.

54. Early in the thirties, and particularly following the amendment of the Railway Labor Act in 1934, an intensive organizing campaign was inaugurated by the organizations affiliated with the RED, which resulted in reestablishing these organizations on virtually every railroad throughout the country.

55. The handling of grievances growing out of the application or interpretation of agreements is likewise a function of the RED. When a dispute of this character arises it is handled by the local committee under the rules of the agreement. If it cannot be adjusted, it is referred to the grievant's general chairman, who handles it up to the highest officer of the railroad designated to handle such grievances or disputes. If no settlement can be reached, he refers it to an international officer of his union, where it is reviewed and if the case has merit, it is referred to the RED for further handling with the Second Division of the National Railroad Adjustment Board set up under the Railway Labor Act to dispose of such grievances and disputes.

56. From time to time, industry-wide movements are conducted to improve wages and working conditions. The organizations affiliated with the RED cooperate with the other non-operating railway labor organizations in such efforts. In this regard, the demands of the membership as expressed through resolutions of local lodges and by convention action are discussed by and among the participating organizations and a uniform program is agreed upon. Then uniform notices are served by all involved unions on the individual railway systems. If no settlement is reached, customarily the dispute is submitted to and is considered by a national conference committee representing the employees and the carriers. The employees conference com-

mittees are composed of the chief executives of the participating organizations, and the President of the RED.

57. Another important phase of RED activity is the improvement of railroad apprenticeship programs. In recent years a plan was developed by the RED providing for the joint participation of management and the organizations for the training of apprentices. The objective of this plan was to establish an apprentice training program by agreement with the individual railroads and thus provide a program including both on-the-job training and related instruction. It has been adopted by a number of large carriers.

58. Technological changes, as well as consolidations, reorganizations, and abandonments have had a serious impact on railroad employment. Some progress has been made by the RED through direct negotiations with the individual railway managements in keeping railroad work in railroad shops and thereby stabilize employment.

59. In general, the RED serves as a clearing house for many matters affecting the welfare of the employees represented by the affiliated organizations. Extensive records are maintained at RED headquarters and the general chairmen frequently avail themselves of the advice and assistance offered by the RED either through correspondence or by consulting with the officers and members of the staff. Such matters as revision of the agreement, the handling of grievances, instability of employment, apprenticeship training, as well as numerous questions regarding the health and welfare program and the Railroad Retirement and Railroad Unemployment Insurance Acts are usually handled through the RED.

60. The RED has no direct membership. Its activities and operation are financed by the affiliated international organizations on a budget basis, according to the number

of railroad employees in their respective crafts or classes. The RED is dedicated to serve the best interests of the employees and in coordinating the activities of these organizations to provide efficient representation.

61. Each RED Executive Council member is often functionally represented in the operation and affairs of the RED by a vice president or other representative. Thus, while Mr. Berg is president of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, he has two representatives who generally undertake the representation of that organization in the RED. Mr. Eric Erickson is the Boilermakers representative and Mr. Edward Wolfe, a vice president of the International, represents the Blacksmiths although each can function in the role of the other with respect to railway employee matters. The Brotherhood Railway Carmen is represented by Mr. Bernhardt. The International Brotherhood of Electrical Workers, whose President is Gordon M. Freeman, is represented by Vice President Thomas S. Ramsey. Mr. A. J. Hayes, President of the International Association of Machinists, is represented by Mr. Joseph W. Ramsey, a vice president of the International. The Sheet Metal Workers International Association, whose President is Edward Carlough, is represented by Vice President J. W. O'Brien. The International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers is represented by Vice President James B. Zinc, although Anthony Matz is the President of that organization.

62. The AFL-CIO maintains its headquarters in Washington, D. C., and six of its seven separate trade departments reside within the headquarters building. The seventh department, the RED, maintains its headquarters at Suite 1212, 220 South State Street, Chicago, Illinois.

B. System Federation No. 69

63. System Federation No. 69 is composed of the six shop-craft unions representing mechanical employees employed by the FEC. Its present officers are:

R. M. Cooke, a rank and file FEC employee who also serves as General Chairman of Local Lodge No. 487, Brotherhood Railway Carmen of America, AFL-CIO.

T. B. Steadman, who is the General Chairman of District Council No. 8, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

R. L. Lanier, who is also General Chairman of District Council No. 42, Sheet Metal Workers International Association.

R. W. McDougall, who is also the President and General Chairman of District 16, International Association of Machinists.

C. A. Dupont, a rank and file FEC employee who also serves as President and General Chairman of Local 888, International Brotherhood of Electrical Workers.

Ray Abner, who is also General Chairman of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

64. System Federation No. 69 is governed by By-Laws that were adopted on January 20, 1934 (Exhibit 33). Each of the shop-craft local lodges, whose members are employed by the FEC, is represented by and a member of System Federation No. 69. The System Federations do not pay dues to the RED. System Federation No. 69 receives a per capita tax of 5¢ per month per member for each shop-craft employee working on the FEC property. The money is paid by the financial secretary of the District Council or

in the case of the Brotherhood Railroad Carmen from the joint protective board except for the International Brotherhood of Electrical Workers, and in that case the money is paid from the local lodge. On the FEC property, System Federation No. 69 functions as the coordinating body for all matters common to the shop-crafts. For example, System Federation No. 69 prepared and served the 1961 Section 6 notice. It also has the authority to pass preliminarily upon the validity of grievances which may be finally presented to and adjudicated by the Second Division of the National Railroad Adjustment Board which exists pursuant to the Railway Labor Act.

VII. THE INTERNATIONAL UNIONS, THEIR SUBORDINATE BODIES AND RAILWAY EMPLOYEE REPRESENTATION

65. Four of the International Unions involved in the 1961 wage and rule dispute with the FEC are:

International Brotherhood of Electrical Workers
(The Constitution of this organization is Exhibit 34).

International Association of Machinists
(The Constitution of this organization is Exhibit 35).

Sheet Metal Workers International Association
(The Constitution of this organization is Exhibit 36).

International Brotherhood of Boilermakers, Iron
Ship Builders, Blacksmiths, Forgers and Helpers
(The Constitution of this organization is Exhibit 37).

66. The International Brotherhood of Electrical Workers has approximately 800,000 members of whom approximately 20,000 are employed by employers subject to the Railway Labor Act, and most of the balance are employed by employers within the meaning of Section 2(2) of the National Labor Relations Act. The railroad employees are in approximately 250 lodges out of about 1800 subordinate bodies.

67. The International Association of Machinists has approximately 800,000 total membership of whom approximately 48,000 are employed by employers subject to the Railway Labor Act, and most of the balance are employed by employers within the meaning of Section 2(2) of the National Labor Relations Act. The railroad employees are in approximately 370 lodges out of about 3,725 subordinate bodies.

68. The Sheet Metal Workers International Association has approximately 118,000 members of whom approximately 10,400 are employed by employers subject to the Railway Labor Act, and most of the balance are employed by employers within the meaning of Section 2(2) of the National Labor Relations Act. The railroad employees are in approximately 220 locals out of about 515 subordinate bodies.

69. The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers has approximately 120,000 members of whom approximately 4,400 work for employers subject to the Railway Labor Act and most of the balance are employed by employers within the meaning of Section 2(2) of the National Labor Relations Act. The railroad employees are in approximately 125 locals out of about 435 subordinate bodies.

70. The Brotherhood Railway Carmen and the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, are engaged primarily in employee representation in the railway industry.

A. International Association of Machinists

71. Vice President J. W. Ramsey has charge and over-all supervision of the Local Lodges and District Councils of the International Association of Machinists representing individuals employed on railroads. Unlike the other eight vice presidents of this International, Mr. Ramsey's func-

tions are limited to railroads no matter where such railroads are located within this country and Canada. The remaining International vice presidents, on the other hand, function within prescribed geographical areas. The headquarters of the International is located in Washington, D. C., and all activities of the International are directed from that building with the exception of railway matters, which are handled by Mr. Ramsey from his office in Chicago, Illinois.

72. At conventions of the International Association of Machinists the delegates from railway lodges sit together and such delegates caucus apart from non-railway lodge delegates on matters which pertain exclusively to railway matters. All delegates vote in connection with the election of all International officers.

73. On the FEC system, the International Association of Machinists has approximately 148 members who belong to lodges located in St. Augustine and Miami, Florida. There are two lodges in St. Augustine, designated Nos. 1272 and 2005, and their membership is composed only of FEC employees. The lodge in Miami, designated as No. 816, however, has members employed by the Seaboard Airline Railroad Company as well as the FEC. None of the three lodges admit employees to membership who are employed outside the railway industry.

74. The three lodges representing employees employed by the FEC are a part of District 16, International Association of Machinists. District 16 is made up of 16 local lodges on five different railroad systems in six Southeastern States. Robert William McDougall, the successor to Lee A. Haley, is both President and General Chairman of District 16. He receives his salary from District 16. He assumed office on November 16, 1961. Each of the local lodges constituting District 16 elects a delegate to attend meetings held by District 16. Mr. McDougall has no authority over the non-railway lodges which exist within his

territorial authority. Mr. McDougall, as a general chairman, participated in the FEC negotiations. Mr. McDougall appears before the National Railroad Adjustment Board, Division 2, for the purpose of handling employee grievances which arise on the several railroads employing members of lodges affiliated with District 16.

B. International Brotherhood of Electrical Workers

75. Local lodges and District Councils representing individuals employed on railroads are encompassed within the Tenth District and are under the immediate control of Vice President Thomas V. Ramsey. The offices of this International and all of its departments except the Tenth District are located in Washington, D. C. The offices of the Tenth District and of Mr. Ramsey are located in Chicago, Illinois. The International's Constitution contains provisions applicable to railway employees. Unlike the other Vice Presidents of this International who are selected from delimited geographical areas, the Vice President of the Tenth District is selected from the "United States, its territories and Canada, on railroad matters." The persons who elect the Tenth District Vice President are delegates from railway locals only, these are locals chartered by the International that are composed of railway employees only. Local 888 represents the FEC employees employed as shop-craft electricians, and Mr. C. A. Dupont, a rank and file FEC employee, is the General Chairman and President of that local. He has no jurisdiction over non-railway lodges. Local 888 has approximately 35 members who are employed on the FEC system. Mr. Dupont is the successor to Mr. C. E. Carter.

C. Sheet Metal Workers International Association

76. The local lodges and district councils of the Sheet Metal Workers International Association which represent employees who work on railroads are under the control and supervision of General Vice President J. W. O'Brien.

Article Twenty-one of the Association's Constitution is applicable only to railroad locals and councils affiliated with the Association. The railway locals and district councils hold meetings of officials of railway locals about twice a year. Mr. Robert L. Lanier is General Chairman of District Council 42, Sheet Metal Workers International Association. District Council 42 is composed of approximately 20 locals whose members are employed by eight different railroads in the Southeastern States. Locals 494 and 142 are composed of FEC employees, although there are members of Local 494 who are employed by the Seaboard Airline Railroad Company. The General Chairman of District Council 42 is elected to that post by delegates from each of the locals making up the Council. Mr. Lanier answers directly to Mr. O'Brien at the International level. The General Chairman of District Council 42 receives his salary solely from the Council. Mr. Lanier has no jurisdiction over any local lodge representing other than railroad employees. Mr. Lanier is the successor to Mr. A. P. Williams.

D. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers

77. In June of 1953 the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America amalgamated with the International Brotherhood of Blacksmiths, Drop Forgers and Helpers thereby creating the presently styled organization. Prior to the amalgamation, each of the Internationals had acquired bargaining rights on railway systems throughout this country and Canada, each of the organizations was affiliated with the RED and each had shop-craft locals that were affiliated with System Federations. Mr. Eric Erickson is attached to the Headquarters of this International and he is concerned primarily with matters involving the railway industry. Mr. Edward Wolfe, a vice president, is concerned with matters affecting Blacksmiths working for railroads and in indus-

trial plants and often works with Erickson on railway matters. Mr. Wolfe maintains an office in Chicago, Illinois. The locals and district councils which represent railroad employees hold meetings attended only by delegates from railway locals. The International does not have a local representing employees on the FEC system because there are only ten FEC employees within the craft jurisdiction. However, the ten employees are a part of and represented by Local 20 in Jacksonville, Florida, which is one of about seventeen local unions exclusively representing employees employed by approximately eight railroads in the Southeastern States. These seventeen or so locals make up District Council No. 8. Mr. T. B. Steadman is the General Chairman of District Council No. 8, and he has no jurisdiction over non-railroad locals. Mr. Steadman's predecessors as general chairman of the crafts now comprising District Council No. 8 were Mr. M. C. Crawford and Mr. B. H. Suits. Mr. Steadman is salaried and paid by District Council at No. 8.

VIII. PICKETING AT AND NEAR CAPE KENNEDY AND MERRITT ISLAND LAUNCH AREA

A. Background

78. On January 18, 1963, the FEC entered into a memorandum of agreement with NASA, providing for the design, construction, operation and maintenance of a rail line from the main line of the Florida East Coast Railway at a point north of Titusville to the vicinity of Wilson within the Merritt Island Launch Area. In addition, a contract to operate and maintain spur lines (herein called east and west spurs) to various locations designated by NASA was also given to the FEC. The east and west spur lines were to be constructed by the Corps of Engineers utilizing various building and construction contractors. The same contractors were to maintain these spurs until they were turned over to the FEC.

79. The FEC thereafter constructed a spur leading from the FEC main line to a point easterly across the Indian River to Highway AIA at Wilson. The FEC was given an easement for the portion of tracts from the main line to Wilson. The west spur has been constructed by NASA and is operated to a point about 7 miles south of Wilson and located somewhere between the Vertical Assembly Building and the Industrial Area at MILA. The west spur is eventually to extend down to the Industrial Area. The east spur goes to Cape Kennedy and has been laid and surfaced but will not be operative until sometime in March 1964. When the east spur becomes usable, FEC will operate trains on that spur as well as on the west spur. FEC will not maintain either spur until such time as the entire project has been finally accepted by the Government. Construction and maintenance of the east and west spurs is being performed by two contractors, B. B. McCormick and Bailes & Sey, and at no time material has either east or west spurs been turned over to the FEC. (See Exhibit 38 as to location of spurs.)

80. On December 29, 1963, the FEC completed its portion of the spur from the mainline to Wilson, and the next day began hauling its own construction materials as far as Wilson on the completed track. In January 1964, freight was transported past Wilson for the use of Bailes & Sey. In this same month, the FEC also transported steel to the VAB building for the use of Blount Brothers Construction Company.

81. The construction and maintenance of the FEC portion of the track has been undertaken by contractors pursuant to agreement with the FEC.

82. Following construction of the FEC portion of the spur leading to MILA on December 30, 1963, the FEC operated its equipment on that portion of the spur exclusively with FEC supervisory personnel who are not covered by the contracts between FEC and the various unions repre-

senting FEC employees. As far as construction of the FEC portion of the spur is concerned all of the construction work has been contracted out by FEC to the following contractors: Powell Brothers (substructure of bridge over the Indian River); Nashville Bridge Co. (steel super structure for the bridge); Bauer Dredge Co. (hydraulic fill); Houdaille-Duval (land fill); Smith & Sons (laying of the track); Florida Power & Light Co. (lighting); Cleary Brothers (steel erection subcontractor from Nashville Bridge Co. and construction of two piers under subcontract from Powell Bros.); West Florida Electric Co. (electrical installation on movable bridge under subcontract from Nashville Bridge Co.).

83. For all practical purposes no normal maintenance work had by February 12, 1964 been necessary on the FEC portion of the spur. When any such maintenance work becomes necessary in the future it will be performed by contractors. FEC will not perform its maintenance work with its own personnel, although it has in the past on its other operations both performed such work with its maintenance employees and subcontracted out the maintenance work. Whenever reference has been made to construction and operation or maintenance of the spur track, these references include the same kind of work with respect to a roadway alongside the spur tracks. It is contemplated that this roadway will be used by trucks when performing maintenance work so as to prevent obstructions of the railroad tracks. This roadway has been used by both the FEC and by contractors. Construction work on the FEC portion of the spur did not begin until sometime in July 1963, and NASA began construction on its portion sometime in August 1963.

84. In new construction of the type and magnitude involved in the construction of the spur line, it has been the practice of the railway to have such work performed by outside contractors. This policy was also followed in the

instant case. One of the determining factors resulting in the decision to contract the work was lack of equipment necessary to perform the construction work involved, such as dredges and other heavy equipment. Even if FEC had had those employees in service during the period of construction who were working prior to January 23, 1961, it would not have had the equipment or the know-how of trained personnel to perform the work. Inasmuch as the MILA spur is some distance from the FEC main line, and inasmuch as the employment of additional personnel would be required to maintain this spur, even in the absence of a strike, the FEC would seek to contract the maintenance work to outside contractors as such work became necessary. This is true with respect both to the FEC portion of the spur as well as the NASA portion of the spur. Whatever work FEC itself has performed on the MILA spur tract, primarily inspection work, has been performed exclusively by supervisory personnel. The supervisory people have devoted most of their time performing supervisory functions. Whatever incidental amount of work directly related to the operation of the railroad has been called for has also been performed by the same supervisory personnel.

85. FEC only has had one so-called "hi-rail" truck which is a truck that can travel both on the railroad track and the highway used on the MILA spur. This "hi-rail" truck has been assigned to one of FEC's supervisors, Road Master Tedrick, for his personal use and convenience. Mr. Tedrick uses this "hi-rail" truck for transportation purposes in the performance of his official duties. In addition to this "hi-rail" truck FEC supervisory personnel travel each day either by car or by truck along the roadway next to the spur track or on the public highways in the MILA area in the performance of their duties, such as inspecting, directing and planning. The contractors involved in the construction work of the spur track transport their personnel on the highways into and out of the MILA area. They also use the roadway along the spur

track. The FEC supervisory personnel's functions of inspecting and directing construction work require their presence both on the FEC portion of the spur as well as the Government end of it and once the whole spur becomes operative, FEC supervisory personnel, or whoever is assigned to operate the railroad, will also be required to go on the Government end of the track.

86. Up to date, none of the FEC personnel has had occasion either to perform any work at, or to go through, the restricted Cape area with the possible exception of the Freight Traffic Representative for FEC who has clearance to go on the Cape for purposes of soliciting business from the contractors at the Cape.

87. Generally speaking, regular working hours both for the FEC supervisory personnel and for the contractors' employees who perform construction work for FEC have run from 7:00 A.M. to 5:30 P.M. There are times when all these employees may be called upon to work overtime as the need arises. FEC supervisory personnel are on call 24 hours a day, 7 days a week. On Sunday, February 9, 1964, the contractors performed no work. The contractors' employees reported to work at their normal reporting time Monday, February 10, 1964.

88. All of the FEC contractors' employees assemble every morning at the FEC siding south of Titusville. It is at this point that daily instructions are given by the FEC supervisory personnel to the contractors' supervisory personnel as to the day's work and as to where the contractors' employees should be employed for the day. From there the contractors' employees are transported to their respective work locations for the day in trucks owned and driven by the contractors. The work locations of these employees are generally either along the FEC portion of the spur track on MILA or at the FEC fill on the west bank of the Indian River. The contractors' employees are paid by the respective contractors for whom they work and are

also under the immediate supervision of their respective contractors.

89. FEC's supervisors confer with the contractors every morning to plan out what work will be performed by the contractors' employees. Under the FEC contracts with the contractors, FEC has the right to require the termination of any of the contractors' employees employed on the MILA project, if it finds it necessary. FEC also has the right to prevent the hire of any undesirable employee by the contractor at this project. All of FEC's installations, including the New Smyrna Beach yard, depot and shops, the team track at Titusville and the team track and depot at Cocoa have been picketed intermittently by the non-operating railroad unions since January 1963.

B. First Picketing Episode

90. Exhibit 39 is a map of the Merritt Island Launch Area, Cape Kennedy and surrounding area, showing the main line of the FEC and the spur lines onto the Cape and MILA as well as the major roads in the area.

91. On September 11 and 12, 1963, pickets were placed at the FEC sidings in Cocoa and Titusville, Florida, and at points marked I and II appearing on Exhibit 38. The picket signs displayed at these locations bore the following legend:

"Notice to the Public
FEC RR Whose
Facilities are Transporting
To This Project Refuses
To Bargain In Good
Faith. System Division
No. 87, Order of Railroad
Telegraphers. We have
no quarrel with an other
employer."

92. As a result of the aforesaid picketing on September 11th and 12th, employees of various contractors, including employees of Duval, McCormick, Blount, and others, performing building and construction work pursuant to contracts with the United States Army Corps of Engineers, refused to cross the picket lines and perform work for their respective employers at Merritt Island.

93. From September 11, 1963, until the present time, there has been intermittent picketing at the Cocoa and Titusville, Florida sidings of the FEC and the aforesaid picket signs has been used exclusively during such picketing.

94. Sometime after commencement of picketing by the ORT on September 11, 1963, the instant charges were filed with the Regional Director, National Labor Relations Board, Twelfth Region (Exhibits 1, 2, 3). The Regional Director notified the organizations listed in the addenda to the charges of the charges by telegram. In compliance with the Regional Director's instructions the charged parties stated their position within the specified 24-hour period, and Counsel for such parties directed a telegram to the Regional Director and the General Counsel of the National Labor Relations Board (Exhibit 40).

C. Second Picketing Episode

95. On February 9, 1964, a press release was issued by NASA indicating that the FEC had been invested with authority to operate the newly constructed spur, such operations to begin at 6:00 A.M. February 10, 1964, and on February 9, 1964, union officials observed a string of cars coupled to locomotive equipment near the confluence of the main line and the spur.

96. On February 10 and 11, 1964, picketing was resumed at location II and at five locations marked IIA, III, IV, V and VI on Exhibit 38. The legend on the picket signs was

the same as appeared on the picket signs on September 11 and 12, 1963. Pickets were placed on both September 1963 and February 1964 by Mr. O'Connell of the New Smyrna strike team, R. M. Cooke, J. C. Goodson and others. Pictures of the picketing and of the picket signs are attached as Exhibits 41 and 42.

97. The locations of the pickets is as follows: I is a point south of Wilson on Highway AIA adjacent to the west leg of the spur; and II is on U.S. Highway AIA south of Merritt Island where there was picketing in both September 1963 and February 1964. IIA is 2 miles south of II and is opposite to a dirt road leading to a construction project where employees of J. S. Martin Construction Company were working. J. S. Martin has a contract with the Corps of Engineers unrelated to the spur lines. Pickets were initially placed at II on February 10, 1964, but upon observing employees of J. S. Martin Co. working south of the picketing, the pickets moved to IIA. Thereafter there was no picketing at II but only at IIA on February 10th and 11th and employees of J. S. Martin refused to work during the picketing at IIA. III is not shown on Exhibit 38 but is just north of the area shown on Exhibit 38 and represents the point on highway AIA where it intersects with U.S. 1 and it is near the North Gate leading to Merritt Island and Cape Kennedy. IV is south of Mims on FEC property where the spurlines leave the main line. V is on highway 402 and the pickets were located on the west side of a causeway across the Indian River leading to Merritt Island and the Cape. VI is on the highway near the South Gate to Cape Kennedy.

98. The highways AIA, 402 and 401 are highways which the government has not taken over and are open to the public. No security passes are required for traveling on these highways. The picket at I in September 1963, while located within the area covered by MILA, was on a public highway and at no time did either the government security police or the state police disturb these pickets.

99. The spur line situated between the Wilson yards and the point where it joins the main track, south of Mims, has an access road which runs alongside the spur track designed for the use of maintenance personnel and there are three side roads connecting 402 and AIA which side roads cross the access road and the spur tracks. No pickets were placed on any of these access roads.

100. The pickets at I are adjacent to the spur line and can be seen by trainmen or maintenance men on the west supr. The pickets at II and at IIA can not be seen from the tracks or the spur line. All persons entering Merritt Island from the south on highway AIA pass pickets at II and IIA. Pickets at III can not be seen from FEC tracks or the spur lines. Persons approaching Merritt Island or Cape Kennedy from the north pass III. The picket at IV can be seen by trainmen from both the main FEC track and the spur line at the point it joins the main track. The pickets at V can not be seen from the main track but may be seen from the spur track looking down the Indian River. Persons traveling highway 402 to Merritt Island or Cape Kennedy pass the picket at V. The picket at VI cannot be seen from the FEC main tracks or the spur. All persons entering Cape Kennedy from the south enter the South Gate and must pass the picket at VI.

101. There is no road which connects VI directly with the west spur line without traveling thru the Cape area. To reach the west spur line it would be necessary to travel thru the Cape area and over a road connecting Pad A with the VAB building. There was no picketing on this road. During the period of the picketing the east spur was not operational and FEC had not received permission to use any part of this spur. Merritt Island does not have gates. The Cape is restricted and badges are required to enter its gates. During the picketing none of the FEC personnel would have occasion either to perform any work at, or to go through, the restricted Cape area with the possible

exception of the Freight Traffic Representative for FEC who has a badge to go on the Cape to arrange for shipments from the building and construction contractors at the Cape.

102. Duval had a contract from the FEC to perform work on the main spur, which work was completed in November 1963; Duval also had contracts from the Corps of Engineers to perform construction work unrelated to the spur lines work at the Cape, and some of their employees had badges and were working at Cape Kennedy on February 10 and 11, 1964.

103. All persons entering Cape Kennedy and MILA on February 10 and 11, 1964, had to pass a picket. During the periods of the picketing there had been employees of construction contractors working on Launch facilities unrelated to the spur lines at Merritt Island and Cape Kennedy. They are employed from 7:00 A.M. to 4:30 P.M. During the same periods there had been maintenance employees working at Cape Kennedy at all hours each day on missile facilities unrelated to the FEC or the spur tracks. Bucon, Inc. and Franchi Construction are performing construction work at MILA. Some of their employees are members of and represented by locals affiliated with the Sheet Metal Workers International Association. Bucon, Inc. also employs persons who are members of and represented by locals affiliated with the International Brotherhood of Electrical Workers. These employees of Franchi Construction and Bucon, Inc. refused to cross the picket lines on February 10 and 11, 1964. General Dynamics Astronautics and Radio Corporation of America (herein called General Dynamics and RCA respectively), are both engaged at Cape Kennedy in the operation and maintenance of the missile range. General Dynamics employs persons who are members of and represented by lodges affiliated with the International Association of Machinists; RCA employs persons who are members of and represented

by locals affiliated with the International Brotherhood of Electrical Workers; some of these employees refused to cross the picket line and work on February 10 and 11, 1964. Continental Consolidated Corporation is engaged in construction work at Cape Kennedy, and employs persons represented by locals affiliated with the International Brotherhood of Electrical Workers and locals affiliated with the Sheet Metal Workers International Association; some of these employees refused to cross the picket lines on February 10 and 11, 1964.

104. At all times material, employees of General Dynamics, RCA, Continental Consolidated Corporation and other contractors performing work at Cape Kennedy have used the South Gate and passed the point where the pickets at VI were located. FEC employees do not normally work at Cape Kennedy, and at no time material herein have FEC employees had the badges necessary to enter Cape Kennedy or had occasion to use the South Gate to Cape Kennedy with the exception of the Freight Traffic Representative of the FEC. Moreover FEC employees do not work at or in the vicinity of the pickets located at II, IIA, III, V and VI.

105. The picketing was uninterrupted from its commencement on February 10, 1964, until 6:00 A.M. February 12, 1964, when it was halted by reason of a Temporary Restraining Order issued by the United States District Court for the Middle District of Florida, Orlando Division, upon application of an injunction pursuant to Section 10(1) of the Act by the Regional Director, Twelfth Region.

Date _____

By _____

*Counsel for B. B. McCormick
and Sons, Inc.*

BRADLEY ARANT ROSE & WHITE

Date May 27, 1964

By /s/ JOHN J. COLEMAN, JR.
*Counsel for Blount Brothers
 Corporation*

Date _____

By _____
*Counsel for Houdaille-Duval
 Company*

Date 5/13/64

By /s/ RICHARD H. FRANK
*Counsel for International
 Brotherhood of Electrical Work-
 ers; International Association of
 Machinists;
 Sheet Metal Workers Inter-
 national Association;
 International Brotherhood of
 Boilermakers, Iron Ship Build-
 ers, Blacksmiths, Forgers and
 Helpers; and their agent System
 Division No. 87, The Order of
 Railroad Telegraphers*

Date 6/8/64

By /s/ JOSEPH V. MORAN
*Counsel for the General Counsel
 National Labor Relations Board*

Addendum to the Stipulation

Come now Richard H. Frank, attorney for Respondents in the above-captioned matters and Joseph V. Moran, Counsel for the General Counsel in accordance with the Board's Order dated July 7, 1964 file the following additional facts and request that the Board make this Addendum a part of the Stipulation entered into by the parties on June 8, 1964 and approved by the Board on June 15, 1964.

D. Third Picketing Episode

106. On June 8, 9, 10, 1964 picketing occurred at locations II, IIA, III, V, VI as designated on Exhibit 38. The legend on the picket signs at the above locations was:

NOTICE TO PUBLIC
F.E.C.R.R. WHOSE
FACILITIES ARE TRANSPORTING
TO THIS PROJECT
REFUSE TO BARGAIN
IN GOOD FAITH
BRO'D MAINTENANCE OF WAY
EMPL LOCALS 2020 717
WE HAVE NO QUARREL WITH
ANY OTHER EMPLOYERS.

For some period of time on June 8, 1964 a picket sign with the following legend was also displayed at location II Exhibit 38:

NOTICE TO PUBLIC
F.E.C.R.R. WHOSE
FACILITIES ARE TRANSPORTING
TO THIS PROJECT
REFUSE TO BARGAIN
IN GOOD FAITH
SYSTEM DIV No 87
ORDER OF R. R. TELEGRAPHERS
WE HAVE NO QUARREL WITH
ANY OTHER EMPLOYERS.

Exhibit 43 is a photograph of the picket signs referred to above.

All other picket signs used in the period June 8 through June 10, 1964 had the designation of Brotherhood Maintenance of Way Employees.

107. Signs used during the June 8, 9, 10 picketing were the same signs used by ORT pickets in September, 1963, and February 1964 with the reference to Brotherhood Maintenance of Way Employees physically superimposed over the name System Division 87, Order of Railroad Telegraphers. A photograph of the picket sign is attached as Exhibit #44. Such signs were obtained from the New Smyrna strike headquarters where they had been stored after cessation of the February 1964 picketing. The June 1964 picket signs were carried by Brotherhood Maintenance of Way Employees members some of whom also participated as pickets in the February, 1964 picketing.

108. June 1964 pickets were placed at the various locations by J. C. Goodson, Assistant General Chairman, Brotherhood Maintenance of Way Employees. Goodson assisted in placing of the pickets in September, 1963 and February 1964. (See Stipulation Item 96).

109. The Master Strike Team (Stipulation, Item 39) at all times material had final authority and control over and was kept fully advised of the picketing at MILA and Cape Kennedy during September, 1963, February and June, 1964 picketing. J. E. Leighty, chairman of the Eleven Cooperating Railway Labor Organizations was aware of the June 1964 picketing prior to and during its occurrence at MILA and Cape Kennedy.

110. All funds expended in connection with Florida East Coast strike were furnished by the participating Unions.

111. The June 8, 9, 10 picketing occurred under the same conditions and circumstances set forth in points B, C of the

Stipulation and caused another work stoppage as occurred during the September 1963 and February 1964 picketing.

112. The picketing was uninterrupted from its commencement on June 8, 1964 until 6:00 a.m. June 11, 1964, when it was halted by reason of a Temporary Restraining Order issued by the United States District Court for the Middle District of Florida, Orlando Division, upon application for an injunction pursuant to Section 10(1) of the Act by the Regional Director, Twelfth Region. A temporary injunction upon said application pursuant to Section 10(1) of the Act was issued by the above-named Court on June 18, 1964.

Date July 17, 1964

By /s/ RICHARD H. FRANK, Esq.

Richard H. Frank, Esquire,

*Counsel for International
Brotherhood of Electrical Work-
ers; International Association of
Machinists;*

*Sheet Metal Workers Inter-
national Association;*

*International Brotherhood of
Boilermakers, Iron Ship Build-
ers, Blacksmiths, Forgers and
Helpers; System Division No. 87,
The Order of Railroad Tele-
graphers; Brotherhood Mainte-
nance of Way Employees*

Date July 17, 1964

By /s/ JOSEPH V. MORAN, Esq.

Joseph V. Moran, Esquire

*Counsel for the General Counsel
National Labor Relations Board*

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**Petition for Review of a Decision and Order of the
National Labor Relations Board**

*To the Honorable, the Judges of the United States Court of
Appeals for the District of Columbia Circuit:*

Come now the Petitioners, the Respondents in the matter of International Brotherhood Of Electrical Workers, AFL-CIO; International Association Of Machinists, AFL-CIO; Sheet Metal Workers International Association, AFL-CIO; International Brotherhood Of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers And Helpers, AFL-CIO; and their agents, System Division No. 87, The Order Of Railroad Telegraphers And Brotherhood Of Maintenance Of Way Employees and B. B. McCormick And Sons, Inc. and Houdaille-Duval Company and Blount Brothers Corporation, Case Numbers 12-CC-284, 12-CC-286 and 12-CC-287, and petition the Court, pursuant to Section 10(f) of the National Labor Relations Act, as amended, (61 Stat. 136, 29 USC 151, *et seq.*), hereinafter referred to as the Act, to review and set aside the Decision and Order of the National Labor Relations Board, hereinafter referred to as the Board, dated December 16, 1964 and reported at 150 NLRB No. 37.

In its Decision and Order the National Labor Relations Board found and concluded that its jurisdiction and authority extend to the regulation of picketing by unions subject to the Railway Labor Act arising wholly from a dispute with an employer subject to the Railway Labor Act, and that such picketing was violative of Section 8(b) (4)(i)(ii)(B) of the Act.

Venue is based upon Section 10(f) of the Act.

The grounds upon which the Petitioners seek relief are as follows:

1. The Decision and Order of the Board, finding that the Petitioners violated Section 8(b)(4)(i)(ii)(B) of the Act is erroneous in fact and law.
2. The Petitioners are not labor organizations within the meaning of Section 2(5) of the Act.
3. The Board is without jurisdiction or authority to invoke its powers and to adjudicate conduct of unions that are not labor organizations within the meaning of Section 2(5) of the Act.
4. The Board's finding that the Petitioners, International Brotherhood Of Electrical Workers, AFL-CIO; International Association of Machinists, AFL-CIO; Sheet Metal Workers International Association, AFL-CIO; International Of Brotherhood Of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers And Helpers, AFL-CIO are principals for whom it is alleged System Division No. 87, The Order Of Railroad Telegraphers and Brotherhood Of Maintenance Of Way Employees acted as agents is erroneous as a matter of law and is not grounded on substantial evidence.
5. The Board's finding that the Petitioners engaged in conduct in violation of Section 8(b)(4)(i)(ii)(B) of the Act is not grounded on substantial evidence.
6. The Board's assertion of jurisdiction and authority is an encroachment upon the separation of powers described in Articles I and II of the Constitution of the United States.

WHEREFORE, The Petitioners respectfully request that this Court set aside the Order of the National Labor Relations Board.

RICHARD H. FRANK
Richard H. Frank
Attorney for Petitioners
918 Marine Bank Building
Tampa, Florida

DATED: December 19, 1964

Answer and Cross-Petition for Enforcement

*To the Honorable, the Judges, of the United States Court
of Appeals for the District of Columbia Circuit:*

The National Labor Relations Board, by its Assistant General Counsel, pursuant to the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), files this answer to the petition for review of its order issued on December 16, 1964.

1. The Board admits the allegations as to parties and venue at pages 1 through 2 of the petition.

2. With respect to the allegations contained in the second paragraph of page 2 of the petition, the Board prays reference to the certified record of the proceedings before the Board for a full recital of the facts and proceedings had in this case.

3. The Board denies each and every allegation of error contained in Sections 1 through 6 of the petition.

4. Further answering, the Board says that the proceedings had before it, the findings of fact, conclusions of law

and order of the Board were and are in all respects valid and proper and requests enforcement of said order.

5. Pursuant to Section 10(f) of the Act, and Rule 38(g) of this Court, the Board will certify and file with this Court a certified list of all documents, stipulation of facts, exhibits and other material comprising the entire record of the proceedings before the Board.

WHEREFORE, the Board prays that this Court cause notice of the filing of this answer and cross-petition for enforcement to be served upon petitioners and that this Court enter a decree denying the petition for review and enforcing the Board's order in full.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.
Jan. 8, 1965

Prehearing Conference Stipulation

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the approval of the Court, hereby stipulate as follows with respect to the issues and the printing and filing of the joint appendix.

I. THE ISSUES

1. Whether the Board properly found that petitioners IBEW, IAM, Sheet Metal Workers and Boilermakers are "labor organizations" within the meaning of Section 2(5) of the Act when engaged in concerted activity, alleged to be violative of Section 8(b)(4)(i)(ii)(B) of the Act, arising out of a collective bargaining dispute with an employer subject to the Railway Labor Act.

2. Whether the Board properly found that petitioners telegraphers and Maintenance of Way Employees participated in a joint venture with the other named petitioners so as to be jointly responsible, as agents of those petitioners, for conduct allegedly violative of Section 8(b)(4)(i)(ii)(B) of the Act.

3. Whether substantial evidence on the record considered as a whole supports the Board's finding that petitioners violated Section 8(b)(4)(i)(ii)(B) of the Act.

II. THE JOINT APPENDIX

The relevant portions of the record shall be reduced to a printed joint appendix, which shall be filed with the Court at the same time as petitioners' brief is filed. The parties agree to share the printing costs equally; the Board will be responsible for the printing of the joint appendix. The appendix will consist of the following:

- (1) The Board's decision and order, dated December 16, 1964.
- (2) Stipulation of Facts.
- (3) Addendum to Stipulation of Facts.
- (4) The petition for review.
- (5) The Board's answer to the petition for review and cross-petition for enforcement.
- (6) This prehearing conference stipulation.
- (7) The Court's order on the prehearing conference stipulation.

For the convenience of the Court and in order to reduce printing costs, the parties agree not to print any of the

exhibits in this case but to lodge a copy of such exhibits with the Clerk of the Court.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost

*Assistant General Counsel
National Labor Relations Board*

Dated at Washington, D. C.,
this 13th day of January, 1965

RICHARD H. FRANK, Esq.
Richard H. Frank, Esquire

Attorney for Petitioners

Dated at Washington, D. C.,
this 13th day of January, 1965

Prehearing Order

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this Court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: Jan. 28, 1965

STATEMENT OF QUESTIONS PRESENTED

The questions presented were formulated in the prehearing conference stipulation, and they are set forth at pp. 70-72 of the Joint Appendix.

1040-0000-1
6-9-65
②

BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19, 084

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, et al, Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITION TO REVIEW AND SET ASIDE, AND ON
CROSS PETITION FOR ENFORCEMENT OF, AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 19 1965

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Tampa, Florida
Attorney For Petitioners

Nathan J. Paulson
CLERK

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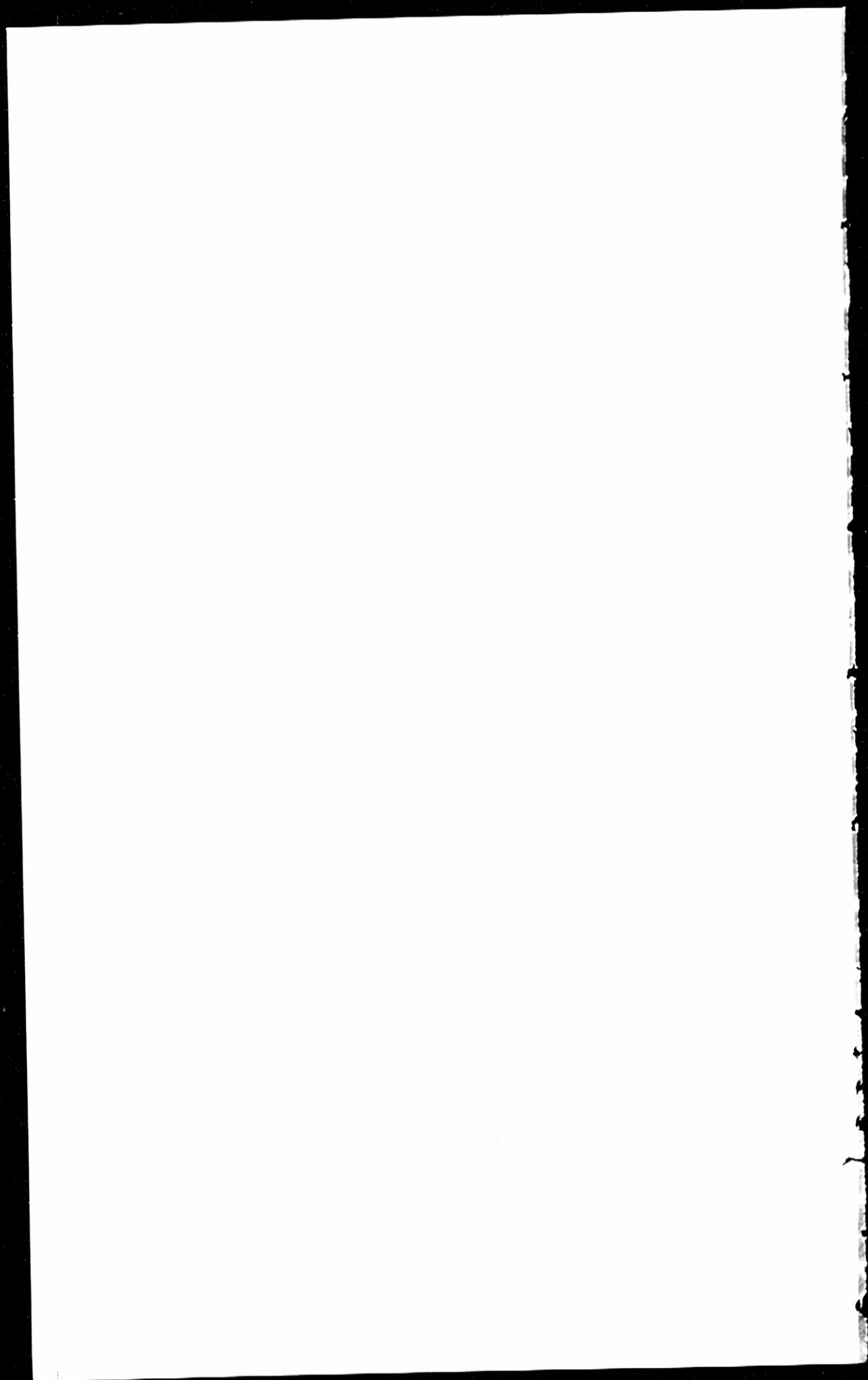
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19, 084

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO; and their agents SYSTEM DIVISION NO. 87, THE ORDER OF RAILROAD TELEGRAPHERS and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Petitioners¹

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITION TO REVIEW AND SET ASIDE, AND ON CROSS PETITION FOR ENFORCEMENT OF, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

This case is before the Court upon a petition to review and set aside an order of the National Labor Relations Board, hereinafter referred to as the Board, issued on December 16, 1964, following a proceeding conducted in accordance with Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151 et seq.), hereinafter

¹ The petitioners, respectively, are referred to in this brief as IBEW, IAM, Sheet Metal Workers, Boilermakers, ORT and BMWE. Collectively, the first four organizations are hereinafter referred to as the Internationals.

referred to as the Act. The Board's decision finding that Section 8(b) (4) (i) (ii) (B) of the Act was violated is reported at 150 NLRB No. 37(J.A. 2-25).² The jurisdiction of this Court has been invoked pursuant to the provisions of Section 10(f) of the Act.³

STATEMENT OF THE CASE

This matter was presented to and considered by the Board upon a stipulation of facts without the customary hearing before and report of a Trial Examiner (J. A. 26). Accordingly, the facts set forth below are undisputed and may be summarized as follows:

I.

The organizations involved in the basic railway labor dispute

A. The Employer

The Florida East Coast Railway, hereinafter referred to as the FEC, operates a Class I railroad between Jacksonville and Miami, Florida (J.A. 28). It is a common carrier subject to the Railway Labor Act (44 Stat. 577, 48 Stat. 1186, 62 Stat. 909, 64 Stat. 1238, 45 U.S.C. Section 151 *et seq.*)

Normally, the FEC's employee complement approximates 2,000 people composed of both operating and non-operating personnel (J.A. 28).⁴ This proceeding arises from a collective bargaining dispute between the FEC and eleven unions, each of which is a bargaining representative of a craft or class of non-operating employees pursuant to the provisions of the Railway Labor Act.

² "J.A." references are to the Joint Appendix. References to exhibits which are contained in the original exhibit file lodged with the Court are designated "Ex. #."

³ In its answer to the petition the Board has cross-petitioned for enforcement of its order pursuant to Section 10(e) of the Act. (J.A. 69-70).

⁴ See *Florida East Coast Railway v. Brotherhood of Railway Trainmen*, 336 F. 2d 172, fn. 2(C.A. 5).

B. The Unions

The following organizations are commonly referred to as the non-operating unions and they are denominated the Eleven Cooperating Railway Labor Organizations (J.A. 30):

1. Brotherhood of Maintenance of Way Employees.
2. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.
3. Brotherhood of Railroad Signalmen.
4. The Order of Railroad Telegraphers.
5. Hotel and Restaurant Employees' and Bartenders' International Union.
6. International Association of Machinists.
7. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers.
8. Sheet Metal Workers International Association.
9. Brotherhood Railway Carmen of America.
10. International Brotherhood of Electrical Workers.
11. International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

Ten of the above unions gained a bargaining representative status upon the FEC system pursuant to elections conducted in the years between 1934 and 1941 by the National Mediation Board under the provisions of the Railway Labor Act (J.A. 28-30; Ex's. #4, #5, #6, #7, #8, #17, #18, #19, and #20). The eleventh union, the ORT, was recognized by the FEC prior to 1935 (J.A. 30).

Within the Eleven Cooperating Railway Labor Organizations there are six unions that represent only the mechanical or shop employees (J.A. 31). The six organizations, identified as follows, comprise and are known as the "shop craft" unions (*ibid*):

1. International Brotherhood of Electrical Workers.
2. International Association of Machinists.

3. Sheet Metal Workers International Association.
4. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers.
5. Brotherhood Railway Carmen of America.
6. International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

The "shop craft" unions, in turn, make up the Railway Employees' Department, AFL-CIO, hereinafter referred to as the RED (J.A. 39-40). The RED was organized primarily by those unions representing the mechanical or shop employees employed exclusively by railroads and it has at times had affiliates that represent railroad employees not within the "shop craft" classifications (J.A. 40). Today, however, and for many years past, the RED, through a railway representative of each of the affiliated craft unions, has undertaken the collective bargaining representation of only "shop craft" employees numbering approximately 300,000 employed by the many railway systems throughout the country (*ibid*). The purposes and functions of the RED are many and varied (J.A. 39-45). Perhaps most significant among its several responsibilities has been the creation and administration of subordinate bodies known as System Federations (J.A. 41-42). It is through the organizational scheme of the RED and System Federations that each of the affiliated unions undertakes and executes its obligations to railway "shop craft" employees (J.A. 42).

Thus, System Federation No. 69 was formed as the primary collective bargaining representative for "shop craft" employees employed by the FEC (J.A. 46). In 1934, System Federation No. 69, pursuant to elections conducted by the National Mediation Board under the provisions of the Railway Labor Act, was certified as the representative of all FEC mechanical employees (Ex's. #4, #5, #6, #7 and #8). Thereafter, it executed collective bargaining agreements with the FEC and the

latest such agreement bears the date of May 1, 1953 (Ex. #11).

System Federation No. 69 is composed of representatives of each of the local bodies whose craft members are employed by the FEC (J.A. 46, 49-52). The local bodies do not admit non-railway employees to membership (J.A. 49-52). Moreover, there are no lines of authority or jurisdiction between the local bodies confined to the FEC or other railway systems and local unions engaged in representing non-railway employees (*ibid*). And, the internal structure of each of the Internationals recognizes and distinguishes between railway and non-railway members (J.A. 47-52).

II.

The Basic Dispute

In August of 1961, the Eleven Cooperating Railway Labor Organizations determined to initiate a national effort to improve the rates of pay of non-operating railway employees and to require the railway carriers to provide six months advance notice of reductions in work force (Ex. #23). Pursuant to this determination, appropriate notices, as required by Section 6 of the Railway Labor Act (45 U.S.C. Section 156), were served by each of the involved unions upon the nation's railway carriers including the FEC (Exs. #21 & #22; J.A. 31). System Federation No. 69 also served the FEC with a Section 6 notice subscribed by its President and the General Chairman of each of the six affiliated crafts (Ex. #21). The FEC countered with a notice proposing that non-operating employee wages be reduced by 20% and that only 24 hours advance notice be given prior to discharge (J.A. 32). The FEC also refused to participate in multi-employer or conference bargaining and informed the unions that it would bargain independently of all other carriers (J.A. 33).

On June 5, 1962, a national agreement was reached, with-

out the participation of the FEC, between all of the nation's carriers and the non-operating unions in which the recommendations of Presidential Emergency Board No. 145 were mutually accepted (J.A. 33; Ex. #24). Efforts to resolve the remaining dispute with the FEC were fruitless (J.A. 33-36). On January 16, 1963 a decision was reached by the Eleven Cooperating Railway Labor Organizations to strike the FEC on January 23, 1963 (J.A. 36).

On January 23, 1963 pickets appeared at various locations along the FEC system with placards bearing the following language:

Non-operating
Employees
AFL-CIO
FEC Ry.

on

Strike (Ex. #28)

Meetings between the FEC, representatives of the unions and representatives of the National Mediation Board held after commencement of the strike were also unsuccessful in resolving the dispute (J.A. 37-39).

III.

The Picketing at MILA and Cape Kennedy

On January 18, 1963, the FEC and the National Aeronautics and Space Administration, hereinafter referred to as NASA, entered into an agreement providing for the design, construction, operation and maintenance of a rail spur by the FEC from its mainline at a point between Mims and Titusville, Florida, to Merritt Island Launch Area, hereinafter referred to as MILA (J.A. 23, 52). Two portions of the spur, called the east and west legs, were constructed by the Corps of Engineers, for NASA, through contracts with two construction firms, Bailes & Sey and B. B. McCormick (J.A. 52-

53). The FEC directed the work performed on the east and west legs, and ultimately it will maintain and operate the legs (J.A. 53, 56).

The FEC portion of the spur was constructed by contractors whose employees are under the direct authority and supervision of FEC personnel (J.A. 56). In addition, the FEC, pursuant to its contracts with the construction contractors, had the power to control the hiring and discharge of the contractors' employees (J.A. 57).

That aspect of the spur constructed by the FEC began in July of 1963 and the NASA portion began one month later (J.A. 54). Houdaille-Duval, a construction firm employed by the Corps of Engineers to perform work at Cape Kennedy, was under contract with the FEC to participate in building the FEC portion of the spur (J.A. 61). The employees of Houdaille-Duval performing general construction work at Cape Kennedy entered through the South Gate, the latter being the principal entrance to Cape Kennedy (J.A. 60-61). Similarly, the employees of B. B. McCormick who were working upon the legs of the spur had to enter Cape Kennedy through its South Gate or the other approaches to the MILA-Cape Kennedy area (J.A. 23, 53, 60).

The ORT established its pickets with signs bearing the following legend at points I and II on the mornings of September 11 and 12, 1963 (J.A. 57):

"Notice to the Public
FEC RR Whose Facilities
are Transporting To This
Project Refuses to Bargain
in Good Faith. System
Division No. 87, Order of
Railroad Telegraphers. We
have no quarrel with any
other employer."

Point I is immediately adjacent to the west leg of the spur and Point II is a short distance south of the west leg's terminus (J.A. 23). Trainmen or other persons working at or on the west leg are readily within view from Point I (J.A. 60).

MILA is an open land mass without fences or gates and is laced with a network of roads (J.A. 23). The employees of many employers utilize the roads in going to and from their locations of work on MILA (J.A. 58). During the September picketing the MILA roads and highways were used by the employees of B. B. McCormick who were engaged in both general construction work and work being performed upon the legs of the spur under the direction of FEC supervisory personnel (J.A. 55). The employees of Houdaille-Duval, under the immediate control and direction of FEC supervisory personnel during the September picketing were also transported from their assembly point at the FEC mainline south of Titusville to the FEC portion of the spur over the MILA roads (J.A. 56).

On February 10 and 11, 1964, following an announcement that the FEC would immediately begin its operations upon the spur, picketing was resumed by the ORT (J.A. 58). And, on June 8, 1964, picketing was initiated by BMW and it continued during June 9 and 10, 1964 (J.A. 64). The February, 1964 picketing occurred at points II, IIA, III, IV, V and VI (J.A. 23, 58-59). In June, 1964, the same points were picketed excepting point IV (J.A. 64). On the occasions of picketing in both February and June, FEC employees were either operating motive equipment on the spur or its supervisory employees were still directing the construction work of B. B. McCormick's employees on the east and west legs (J.A. 53, 56).

IV

The Board's Decision

Upon the foregoing facts describing a railway labor dispute

between an employer subject to the Railway Labor Act and eleven unions each of which is a collective bargaining representative of the employees of such employer, the Board found that four of the disputing unions (the Internationals) are labor organizations within the meaning of Section 2(5) of the Act (J.A. 10-14). Although acknowledging that the ORT and the BMWWE, the picketing unions, are not labor organizations within Section 2(5), the Board held they were "agents" of "labor organizations" (the Internationals) since all of the unions comprising the Eleven Cooperating Railway Labor Organizations were engaged in a joint venture (J.A. 16). Finally, the Board found that the picketing was violative of Section 8(b) (4) (i) (ii) (B) of the Act. (*ibid*).

SUMMARY OF ARGUMENT

I. Congress invested the Board with the authority to impose the proscriptions in Section 8(b) of the Act only upon a "labor organization" by reason of the definitions found in Section 2(2) and 2(3) of the Act. The Internationals are not "labor organizations," within the meaning of Section 2(5) of the Act, when engaged in collective bargaining and a related dispute with an employer subject to the Railway Labor Act on behalf of individuals employed by such an employer.

It is not a mere literal application of the statutory definitions which requires this result. The end dictated by the definitions is borne out by the structure and purpose of the Act. The comprehensive scheme of the Act is to create equality of obligation and correlative equality of benefit among employers, employees and labor organizations. Consideration of Section 8(b) in its entirety discloses that when a union is subject to the Railway Labor Act it is outside the Section's scope, since most, if not all of the enumerated unfair labor practices are incapable of application in the railway industry. When the

Internationals are functioning wholly under the aegis of the Railway Labor Act, as in the instant case, the Board's view would subject such unions to the restrictions and liabilities of Section 8(b) (4) only, without the protection and benefits of Sections 8(a) and 9 of the Act—an anomaly Congress never intended in the administration of the Act—indeed, a result Congress carefully sought to avoid.

The Railway Labor Act does not encompass the range of activity that is regulated by Section 8(b) (4) of the Act. The congressional purpose in the Railway Labor Act was simply to supplement "available economic weapons" and to leave "unchanged * * * large areas of [the] railway labor field." *General Committee v. M-K-T. R. Co.*, 320 U. S. 323. Congress certainly did not empower the Board to single out, and by administrative artifice, fill interstices within the framework of the Railway Labor Act.

II. Upon a finding that the Eleven Cooperating Railway Labor Organizations were engaged in a joint venture, the Board could not properly dissociate the Internationals and ascribe the allegedly unlawful conduct to them. A joint venture constitutes all of the participants jointly liable and each is an indispensable party. Had the Board included all of the members of the Eleven Cooperating Railway Labor Organizations in this proceeding, however, it would have more openly demonstrated its transgression.

III. Substantial evidence on the record as a whole compels a finding that the picketing by the ORT and the BMW was lawful. The control over and the direction of the employees of so-called neutral employers by the FEC caused such employers to lose their neutrality. Accordingly, the picketing unions were justified in picketing the several entrance ways to MILA and Cape Kennedy so as to make their appeal to such employees. Any effect upon the employees of neutral employers was incidental and does not render the picketing unlawful.

ARGUMENT

I

The Internationals are not, in the factual context of this case, labor organizations within the meaning of Section 2(5) of the Act and therefore are not subject to the prohibitions of Section 8(b) (4) (i) (ii) (B) of the Act.

Based upon the facts summarized above, pp. 5-6, the Board acknowledged that the Internationals were engaged in a "primary dispute * * * * with an employer subject to the Railway Labor Act" on behalf of "employers [who] are not 'employees' under the National Labor Relations Act." (J.A. 14). It nevertheless held that each of the Internationals is a "labor organization" within the meaning of Section 2(5) of the Act subject to the restraints imposed by Section 8(b) (4) (i) (ii) (B) of the Act (*ibid*). To reach this conclusion the Board glossed over or ignored, (1) the interrelated definitions in Section 2(2), 2(3) and 2(5) of the Act designed to remove railway disputes and related conduct from the prohibitions placed on labor organizations; (2) the incompatibility of the internal structure of Section 8(b) of the Act with a contention that in the framework of a railway labor dispute the Internationals are nonetheless labor organizations regulated by that Section; (3) the accomplishment of the Act's general purpose—to confer benefits upon labor organizations as well as to interdict certain forms of conduct; and (4) the manifest desire of Congress to regulate railway labor and its activities only to the extent provided in the Railway Labor Act.

- A. The pertinent statutory language and its legislative history.

In relevant part, Section 2 of the Act provides that:

When used in this Act—

(2) The term "employer" * * * * shall not include * * * * any person subject to the Railway Labor Act * * * *

(3) The term "employee" * * * * shall not include * * * * any individual employed by an employer subject to the Railway Labor Act. * * * *

(5) The term "labor organization" means any organization * * * * in which employees participate and which exists for the purpose * * * * of dealing with employers * * * *

Congress, in recognition of the pre-existing Railway Labor Act, devised the statutory definitions for the express purpose of delimiting the Act's scope to avoid collision with the former statute. *California v. Taylor*, 353 U. S. 553, 566; *Local Union No. 25, IBT v. New York, N. H. & Hartford Railroad Co.*, 350 U. S. 155, 160. Congress amended Section 2(3) of the Act in 1947 to exclude from the sweep of the word "employee," "any individual employed by an employer subject to the Railway Labor Act." Employers subject to the Railway Labor Act had always been free of coverage under the Act, since on the occasion of its enactment in 1935 such carriers were excluded by Section 2(2) from the meaning of the word "employer." *Shields v. Utah Idaho Cent. R. Co.*, 305 U. S. 177, 184. It is plain that the congressional purpose in amending the definition of "employee" to exclude railway workers was not to alter an already existing immunity accorded the railway employer, but rather, as stated in the Senate Committee Report, to insure the exemption of railway unions from regulation under the Act:

"The exemption of employees of employers subject to the Railway Labor Act is to make it perfectly clear that in providing remedies for unfair labor practices of unions and their agents it was not intended to include such employees."⁵ [Emphasis supplied]

This intention was reiterated on the Senate floor by the Act's chief sponsor Senator Taft:

"Mr. McGrath. I note that the Senator (Murray) is referring to the railway industry. It is my understanding that railway unions are exempt from the provisions of this statute. Am I correct in this understanding?"

"Mr. Ives. The answer to the question * * * * is "Yes."

Mr. Murray. That railroad labor unions are completely eliminated from the provisions of the Law?

Mr. Taft. I want to point out that railway labor has never been covered by the Wagner Act; it has always been covered by the Railway Labor Act. * * * * We saw no reason to change that situation * * * *"

Thus, to "make it perfectly clear" that a railway union was not to be subjected to the restrictions imposed upon a "labor organization or its agents," Congress deleted railway workers from the term "employee." In so doing, the essential expressions "employee" and "employer" were functionally removed from the definition of "labor organization" found in Section 2(5) of the Act.

⁵ S. Rep. No. 105, 80th Cong. 1st Sess., p. 19

⁶ 93 Cong. Rec. 6498

Moreover, in fashioning a federal labor relations statute that would not conflict with the existent Railway Labor Act, Congress did not, contrary to the Board's apparent view, make the Act's coverage depend upon such a tenuous ground as either the style or name by which the union is commonly known or the unpredictable contingency that an organization may represent employees employed by both railway and non-railway employees. Statutory coverage was made to turn upon whether the employer involved in the particular dispute or relationship was subject to the Railway Labor Act.

In 1959 when Congress was legislating against certain evils it found in the internal affairs of some unions, Congressman Harris proposed an amendment to the then pending H. R. 8400 granting railway unions an exemption identical with that found in the Act.⁷ The proposed amendment was defeated and the ultimate statute encompassed all labor unions.⁸ During the course of debate of the Harris proposal, however, a colloquy occurred which reveals full congressional awareness that the collective bargaining status of many unions, including the Internationals involved in this proceeding, is divided between the two statuses:

"Mr. Udall. * * * * Just take as an example the Machinists union. They have many of their people under the Railway Labor Act and a lot also under the NLRB. For example, some of Teamsters union members are under the Railway Labor Act. * * * *"

"Mr. Edmondson. Is it not a fact also that there are a number of Teamsters who are employed by the railroads and come under the railway labor act?"

⁷ 105 Cong. Res. 14505.

⁸ Labor Management Reporting and Disclosure Act of 1959, (73 Stat. 519, 29 U.S.C. 401, et seq.)

Mr. Udall. Yes; a very considerable number of them * * * *”⁹

“Mr. Harris. I would like to say to the gentlemen, I did not intend to nor did I indicate that anyone asked me to propose the amendment from the railroad industry. I was simply being consistent with what Congress did in 1947 in the Taft-Hartley Act. * * * *”

“Mrs. Green of Oregon. When this bill came from the Senate, as I remember, it had but one exemption. The only group that had any exemption pertained to the communications workers. It was proposed in the committee that the exemption be taken out, and as I remember, the committee agreed by a voice vote. There was no agreement for the exemption of any particular group or union. I see no more reason for exempting the railroad workers or the teamsters who come under the Railway Labor Act, who belong to the Railway Express, or the Airline Pilots, or the Machinists, or any other union in the United States, * * * *”

“Mr. Staggers. * * * * In the railroad unions of the country are teamsters, boilermakers, blacksmiths, machinists, and other segments of labor. * * * *”¹⁰

In spite of clear legislative purpose and the familiar principle of statutory construction that “Statutory definitions control the meaning of statutory words —” (*Lawson v. Suwanee Fruit & Steamship Co.*, 336 U. S. 198, 201), the Board advances the proposition that the test of its power in the instant

⁹ 105 Cong. Rec. 14506.

¹⁰ 105 Cong. Rec. 14507.

case is determined not by the basic dispute and the real parties to that dispute, but solely by the fact that the IBEW, IAM, Sheet Metal Workers and Boilermakers "in their overall capacity" are "labor organizations" (J.A. 12). It is submitted that in applying its reasoning, the Board has failed to "look to the provisions of the whole law, and to its object and policy." *Richards v. United States*, 369 U. S. 1, 11. As is demonstrated below, the Board's construction of the Act "would produce incongruous results." *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U. S. 270, 286.

B. The internal structure of Section 8(b) and the comprehensive purpose of the Act

The words "a labor organization or its agents," in the preamble to Section 8(b), is the single expression defining unions which are subject to the prohibitions contained in the succeeding enumerated unfair labor practices. The statutory pattern requires that if a union is a "labor organization" for the purpose of any one of the specified unfair labor practices, it is a "labor organization" within the scope of all the proscriptions. *Di Giorgio Fruit Corp.*, 87 NLRB No. 125, affirmed, *Di Giorgio Fruit Corp. v. NLRB*, 89 App. D.C. 155, 191 F. 2d 642, certiorari denied, 342 U. S. 869. But when the principle is applied in the context of this case an end point is quickly reached which is wholly at war with the Act's scheme. Thus, since the employees of the FEC are not "employees" within the meaning of Section 2(3) of the Act, the Internationals cannot, in violation of Section 8(b)(1)(A), "restrain or coerce" such employees in the "exercise of the rights guaranteed in Section 7." Nor, for the same reason, could the Internationals violate Section 8(b)(2) by cause[ing] or attempt[ing] to cause" the FEC to discriminate against one of its employees. This is true for the added reason that the FEC is not an "employer" within Section 2(2) of the Act. Fur-

thermore, the Internationals cannot be placed in peril of Section 8(b) (3) by refusing to bargain collectively with the FEC since they are not and cannot be "the representatives" of the FEC employees "subject to the provisions of Section 9(a)" and the FEC is not an "employer" within Section 2(2) of the Act. Similarly, Section 8(b)(5), 8(b)(6), 8(b)(7), and 8(e) are inapplicable where, as here, the employer is an "employer subject to the Railway Labor Act." These considerations must be "taken into account if the statute is to operate as a coherent whole." *Marine Eng. Ben. Ass'n. v. Interlake Steamship Co.*, 370 U. S. 173, 181.

The aberrant results of attempting to impose the strictures of Section 8(b) upon the Internationals when they are functioning as railway labor unions demonstrate the conclusion so readily reached from the definitions alone. The Board's theory, based entirely upon the notion that the words, "in which employees participate" found in Section 2(5) of the Act renders the Internationals amenable only to Section 8(b) (4), is palpably absurd. There is nothing in the Act to warrant giving two meanings to the same term used in the same section for the same purpose of delimiting the sweep of a single, unified and related set of prohibitions. The Act is not susceptible of selective dissection and no end will justify "such textual mutilation." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 186.

The preclusion of imbalanced or conflicting application not only of Section 8(b) but of the Act generally is in keeping with the legislative purpose.¹¹ The status of the Internationals as railway unions exempt from the prohibitions of Section 8(b) is harmonious with the purpose underlying the Act as

¹¹ As indicated by dissenting Member Jenkins, Section 8(a) of the Act cannot be enforced to curb conduct of the FEC vis-a-vis its employees who are represented by the Internationals since it is an employer subject only to the Railway Labor Act (J.A. 20)

amended. In 1935, Congress placed its sanction upon employee self-organization and granted protections to the collective bargaining process. A substantial part of this design was accomplished by imposing obligations upon employers. The 1947 amendments to the Act required for the first time that labor organizations refrain from conduct deemed unfair by Congress. Thus, in consideration of its grant and protection of "rights" that were to be enjoyed by employees and their representatives, Congress required of labor organizations behaviour it conceived to be fair. It was the establishment of equality of rights and duties between unions and management which the successful protagonists of the 1947 amendments sought to achieve.¹² Congress, however, to insure that the Act as amended would not invade the sphere of railway labor relations, regulated to its satisfaction by earlier enactments, insured a sweeping exclusion by the amendment of Section 2(3), *supra*, p. 13. "It is clear that neither railroads nor their employees may carry their grievances with one another to the N. L. R. B. for resolution." *Local Union No. 25, supra*, 350 U. S. 155, 159. In contrast to non-railway industries, railway employers and railway labor and its representatives were left in a *status quo ante*. Thus, railway labor could look only to the benefits of the Railway Labor Act and traditional economic weapons for the vindication of rights. Just as it was denied the benefits of Sections 8(a) and 9 of the Act, so too was it relieved of the prohibitions of Section 8(b). The precision with which Congress drew the provisions of the Act to obtain this result is, by itself, persuasive against the validity of the device the Board synthesized to accomplish an arrogation of power. For, had "**** Congress intended to go **** further in its use of the processes of adjudication and litigation then the express provisions of the [Railway Labor]

¹² H. Rep. No. 245, 80th Cong. 1st Sess. pp. 8, 31; S. Rep. No. 105, 80th Cong. 1st Sess. p. 2; 93 Cong. Rec. 3835, 4436, 4437, 6441.

Act indicate" (*General Committee v. M-K-T. R. Co.*, 320 U. S. 323, 333) and expose the activity of railway labor to the Board's control also, it would have so provided. But Congress ordained that concordant co-existence of the statutes was to be accomplished simply by the Board staying its hand and honoring a clear mandate not to intrude into the field of railway labor. Neither the legislative determination to preserve that dichotomy nor the wisdom of its purpose are open to administrative or judicial scrutiny. *Railway Employees' Department v. Hanson*, 351 U. S. 225, 234.

C. The Board's theory.

The facts related above pp. 3-5 disclose that the Internationals are four of the six unions that have historically represented and bargained for railway "shop craft" employees. In this role each of the Internationals by and through the RED was successful in establishing System Federation No. 69 upon the FEC property as a result of elections conducted by the National Mediation Board in accordance with the provisions of the Railway Labor Act. Thereafter, and since 1934, System Federation No. 69 and its constituents, numbering among them subordinate bodies of the Internationals composed only of railway employees, have fulfilled the primary duties associated with collective bargaining on behalf of "shop craft" employees, i.e., coordinating all matters pertaining to the "shop craft" employees, preparing and serving Section 6 notices, adjusting grievances and passing upon matters which are ultimately resolved by the National Railroad Adjustment Board, Second Division. The jurisdiction of the Second Division, significantly, is confined to disputes "involving machinists, boilermakers, blacksmiths, sheet metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees and railroad shop laborers"¹³ Upon this state of the record alone the only

¹³ Railway Labor Act, 45 U.S.C. Section 153, First.

warranted conclusion compatible with the Act's statutory definitions is that the Internationals are not "labor organizations." Rather, they are representatives of employees employed by an employer subject to the Railway Labor Act—a conclusion reached by the Supreme Court in *Virginia Railway Company v. System Federation No. 40, Railway Employees' Department, AFL*, 300 U. S. 515, when it sustained the application of the Railway Labor Act to "shop craft" employees. And by necessary implication this same conclusion was again reached in the *Hanson* case, *supra*, 351 U. S. 225, upon the Supreme Court's affirmance of the validity of the 1951 amendments to the Railway Labor Act permitting the Internationals to negotiate and execute union security agreements with railway employers in spite of state right-to-work laws.¹⁴ Now, however, by a strained construction of the Act, the Board would overturn the ordered scheme of the Railway Labor Act. We turn to consider the rationale urged by the Board in support of its contention that the Internationals, in the context of this case, are "labor organizations."

The Board cannot gainsay that it has looked only to the single, isolated fact that each of the Internationals is made up in part of "employees." It must concede that it completely disregarded the many considerations contra-indicating the course it followed, *supra*, pp 16-17. It is significant that nowhere in its decision does the Board deal with or overcome the undisputed fact that each of the Internationals has a juridical tradition as a representative of railway employees and that each presently occupies that status upon the property of virtually every Class I railroad in the country (see Ex. #24.) We submit that a vacuous application of the phrase "in which

¹⁴ See also *In re Florida East Coast Railway Co.*
32 LRRM 2533. The United States District Court for the Southern District of Florida made the same determination upon the same grounds as did the Supreme Court in *Hanson*.

employees participate" contained in Section 2(5) of the Act will not bridge the gap that must remain between the statutes. A mechanistic literalism is not equal to the task of statutory enlargement that would deny to the Internationals their long recognized status as railway employee representatives.¹⁵

In support of its action the Board relies mainly upon its reasoning in **International Organization of Masters, Mates and Pilots of America** (Chicago Calumet Stevedoring Co., Inc.), 125 NLRB 113.¹⁶ In our view that case is wholly dissimilar and does not sustain the Board's contention.

In the **Calumet** case the events found by the Board to be violative of the Act occurred in an industrial setting over which the Board could assert its authority. In the instant case, however, the conduct imputed to the Internationals is completely associated with a dispute in an industry Congress has specifically withdrawn from the Board's competence. Indeed, even assuming, *arguendo*, that the conduct which forms the basis of the Board's intrusion was secondary in nature, Congress, as we have noted above, p. 18, has not removed such means from the reach of railway labor in the advancement of its objectives (see **Local 833, UAW**, 116 NLRB 267, *infra*, p. 23.) Here, then, unlike in **Calumet**, the inference is plain that the Board first evaluated the conduct and after concluding that it arguably could be brought within the substantive terms of Section 8(b) (4), it searched for a way

¹⁵ Cf. **Pan American World Airways v. United Brotherhood of Carpenters**, 324 F. 2d 217, certiorari denied, 376 U. S. 964.

¹⁶ On petition to review, this Court remanded to the Board with direction that specific findings be made relative to the degree of 'employee' participation in both the involved local and the International. Upon remand the Board adhered to its original decision holding in substance that any 'employee' participation is sufficient to warrant a finding that a union is a labor organization. **Masters, Mates and Pilots Union**, 144 NLRB No. 110. Following the second remand, the Board found that the members of the local were not employees within Section 2(3) of the Act. **Masters, Mates and Pilots Union** 146 NLRB No. 19.

to attach that conduct to a "labor organization." Thus, the Board utilized the same technique to render the Act applicable to the Internationals as it rejected when used by the Masters, Mates and Pilots to seek escape from the Act. Stated differently, the Board by reference to unrelated collective bargaining relationships and workers has sought to create "labor organizations" just as the Masters, Mates and Pilots attempted to shed that status by alluding to its supervisory members who are excluded from the Section 2(3) definition of "employee." But, unlike the Masters, Mates and Pilots, the Internationals are not seeking to avoid general coverage under the Act through the fact of a railway employee membership. The Internationals simply urge that the Board respect their separate status when they are within the mantle of the Railway Labor Act.

Furthermore, the *Calumet* case was concerned with the Section 2(3) definition only insofar as it excludes supervisory personnel from the status of employees. Here, however, we are concerned with the more serious inter-relationship of the Section 2(2) and 2(3) definitions as they reflect the legislative desire for an absolute exclusion from the Act of a substantial segment of industry. Certainly the Board cannot believe there was a parallel degree of congressional concern in the exclusion of supervisors from the Act and the exemption of an entire industry. A greater concern for the total exemption of the railway industry and its unions is manifest from the grant of power in Section 2(11) of the Act allowing the Board factually to determine an individual's possession of supervisory indicia.¹⁷ There is no comparable power in the

¹⁷ Section 2(11) of the Act provides as follows: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Board to define railway unions. Finally, the Court's attention is directed to the Board's own words in *Local 833, UAW (Paper Makers Importing Co.)*, 116 NLRB 267, where it observed that:

"Under Section 2(5) a railroad employees' union is clearly not a labor organization for the purposes of the Act * * * * to sustain the complaint, we would have to find that, nevertheless, for the **limited purposes of Section 8(b) (4)** such union qualifies as a 'labor organization.' We are unable to make such exemption, especially because we believe that matters affecting railroads and railroad employees' unions properly pertain to the orbit of the instrumentalities established by Congress in the Railway Labor Act. It follows that secondary boycott by a railroad union * * * * does not violate Section 8(b) (4) even if such boycott involves inducement of employees of neutral employers subject to the Act. Thus, it is clear that Congress left unregulated a large area of potential secondary boycott activity and did not in fact use all the power at its command to eliminate such activity from the industrial scene. Accordingly, we would do violence to both the language used by Congress in the statute and the congressional intent as revealed in the legislative history if we held that the provisions against secondary boycott were to be enforced beyond the boundaries of our ordinary exercise of jurisdiction." [Emphasis added.]

From the many considerations dealt with above, no one can question that "the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and

the function of the sections relied upon." **American Shipbuilding Co. v. NLRB**, U. S.; 58 LRRM 2672, (March 29, 1965.) We reasonably anticipate, however, that the Board will attempt to defend its application of the Act to the facts of this case on some notion "of its special competence to weight the competing interests * * * * and to accommodate these interests according to its expert judgment" (*id.* at 58 LRRM 2678.) But, as pointed out by Justice Stewart in **American Shipbuilding**, "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." (*id.* at 58 LRRM 2679.)

II.

The Board's finding that the Internationals are responsible for the picketing carried on by the ORT and the BMW is erroneous

Although we do not believe it necessary for the Court to reach the point dealt with here, we do believe that the Board by attempting to impose a vicarious responsibility upon the Internationals for the picketing undertaken by the ORT and the BMW has buttressed our contention that the Internationals, in the framework of this case, cannot be "labor organizations" within the meaning of Section 2(5) of the Act. The Board's finding "that these pickets were acting in behalf of all the striking unions * * * * in furtherance of their common objective to win the strike against the FEC" (J.A. 15) is consistent with and dependent upon facts that describe (1) the traditional manner in which railway unions bargain (see Ex. #24), and (2) the inseparable identification of the Internationals with classic railroad unions. Notably the Board has refrained from involving several of these unions in this

proceeding, albeit, they too are parties to the basic dispute. In the light of the above finding, it is difficult to conceive the Board's justification for isolating the Internationals and labelling them "labor organizations." The basic dispute is of no less or different significance to the Internationals than to any of the other disputing unions. We submit that just as the cognate relationship of the eleven unions emphasizes the inability of the Board logically to sever the Internationals and characterize them as "labor organizations," so too it bars a finding that they can alone be held responsible for the picketing.

We further submit that the Board would be less than ingenuous if it were to urge anything other than mere nomenclature as its criteria for the selection of the Internationals as the unions to be marked "labor organizations." But, the Board has not captured the quality of resourcefulness in its entirety. Just as it is able selectively to single out and brand four unions as "labor organizations," answerable for the activities of the ORT and the BMW, we, with equivalent if not greater validity can assert that the picketing was undertaken for and on behalf of those unions involved in the basic dispute that have not been "chosen" by the Board to be litigants in this proceeding.

In any event, the Board has failed to provide any authority for its view that the Internationals, standing alone, can be held responsible for the picketing in the face of its finding that the Eleven Cooperating Railway Labor Organizations were engaged in a joint venture "in furtherance of their common objective to win the strike against the FEC."

On the other hand, the view is well settled that joint ventures are in the nature of partnerships (*Brown v. Cole*, 155 Tex. 64, 291 SW. 2d 704), and that—

"* * * * in copartnerships there is no such several

liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore, it is that in suits upon these transactions all the copartners must be brought in * * * *¹⁸ *Mason v. Eldred*, 73 U.S. 231, 235.

The requirement that all participants in a joint venture are indispensable is bottomed, in part, on the rule that a controversy affecting the common right of several persons sharing a joint interest in a matter should not be adjudicated without the presence of all. *Shields v. Barrow*, 58 U.S. 130. The balance of the rule is designed to achieve the rendition of final orders adjusting the rights of all concerned (*id.*). The Board's breach of these rules points up their need.¹⁸ Thus, does this litigation determine the right of the five unions not named in this proceeding to engage in the same common situs picketing in furtherance of the same "common objective to win the strike against the FEC?" Or, if such picketing were undertaken by any one of the five excluded unions, would the Board's order or the orders issued by the District Court under Section 10(1) of the Act (J.A. 62 and 66) be offended on the same theory of agency now urged by the Board? Must these questions be resolved by additional litigation at a later time? We contend that the Board cannot be permitted to measure the indispensability of parties by the boundaries of its own

¹⁸ The Supreme Court's unwillingness in *National Licorice Co. v. NLRB*, 309 U. S. 350, to import the "indispensable party" rule into a Board proceeding does not detract from our contention that the Board has pursued only a portion of an entity. In *National Licorice*, the Supreme Court merely refused to allow the employer to salvage its illegal agreements with individual employees on the ground that the employees were indispensable parties (*id.* at 362-364.) It foreclosed application of the rule where it was asserted as a shield to an unconscionable end. We urge the propriety of the rule to insure fairness.

jurisdiction. The "grant of jurisdiction to a particular [tribunal] without more does not determine what parties are indispensable." *United States v. Hellard*, 322 U.S. 363, 365.

III.

Contrary to the Board's conclusions, substantial evidence and established principles disclose that the picketing was lawful

In its effort to condemn the picketing carried on by the ORT and the BMW, the Board focused its attention only upon that aspect of the record showing that much of the picketing occurred at points distant from the FEC tracks (J.A. 9-10.) From this narrow analysis of the evidence, it concluded that the picketing "could only have been directed at employees of neutral employers unconnected with the FEC dispute or FEC operations" (J.A. 10.) A careful consideration of the record, when tested by settled principles, shows the inescapability of a different result.

Briefly, the facts set forth above, pp. 6-8, show that during the picketing at MILA by the ORT in September of 1963, the employees of Houdaille-Duval, and several other employers (J.A. 54,) were under the direct control and supervision of FEC personnel. In February and June, 1964, during the times of the BMW picketing, the employees of B. B. McCormick and Bailes & Sey (J.A. 53) performing work upon the east and west legs of the spur were also under the supervision and control of the FEC supervisors. In addition to its actual control over the work performed by the contractor's employees, the FEC contractually possessed the right to regulate the hiring and discharge of such employees. The evidence further shows that during each of the three picketing episodes, the employees of the various contractors were transported over the vast network of roads passing through

MILA and into Cape Kennedy. From this examination of the record, it is plain that the Board's all too facile finding that the appeal was directed "only" at the employees of neutral employers fails.

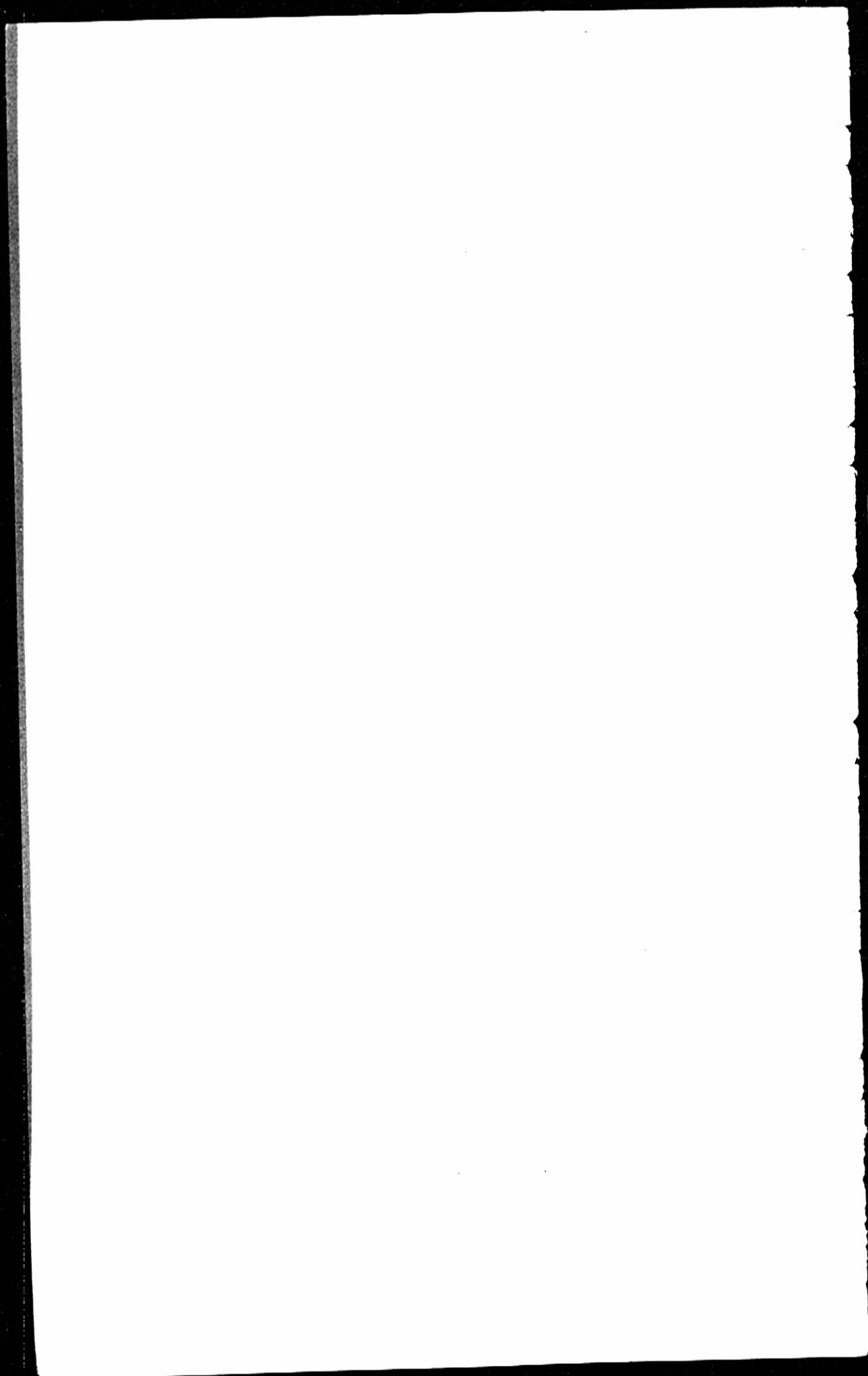
The proposition is too well settled to require extensive citation of authority that an employer who exercises "direction and control" over the employees of a disputing employer loses the protections of Section 8(b) (4) of the Act. **Building Service Employees v. NLRB**, . . . App. D. C. —, 313 F. 2d 880; **Local Union No. 83, IBT (Marshall & Haas)**, 133 NLRB No. 116. In the circumstances of this case the evidence discloses more than direction and control. The FEC had the power to dictate to the subcontractors not only who would be hired, but also who would be retained. In short, the FEC was the actual employer of the people who nominally worked for the subcontractor^s. Accordingly, the ORT and the BMWE were fully justified in seeking to make their appeal to those construction employees, under the domination of the FEC, who passed through the picketed entrances.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition be granted and that a decree issue setting aside and denying enforcement of the Board's order.

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April 16, 1965.



**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 19,084

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review, and on Cross-Petition
for Enforcement of, an Order of the
National Labor Relations Board

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 24 1965

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STATEMENT OF QUESTIONS PRESENTED

The questions presented were formulated in the pre-hearing conference stipulation (J.A. 70-72), and are as follows:

1. Whether the Board properly found that petitioners IBEW, IAM, Sheet Metal Workers and Boilermakers are "labor organizations" within the meaning of Section 2(5) of the Act when engaged in concerted activity, alleged to be violative of Section 8(b)(4)(i)(ii)(B) of the Act, arising out of a collective bargaining dispute with an employer subject to the Railway Labor Act.

2. Whether the Board properly found that petitioners Telegraphers and Maintenance of Way Employees participated in a joint venture with the other named petitioners so as to be jointly responsible, as agents of those petitioners, for conduct allegedly violative of Section 8(b)(4)(i)(ii)(B) of the Act.

3. Whether substantial evidence on the record considered as a whole supports the Board's finding that petitioners violated Section 8(b)(4)(i)(ii)(B) of the Act.

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL
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On Petition for Review, and on Cross-Petition
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BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of the International Brotherhood of Electrical Workers, *et al.*,¹ to review and set aside an order of the Na-

¹ Petitioners are: International Brotherhood of Electrical Workers, AFL-CIO (herein called "IBEW"); International Association of Machinists, AFL-CIO ("IAM"); Sheet Metal

tional Labor Relations Board issued pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). In its answer to the petition, the Board has requested enforcement of its order. The Board's Decision and Order (J.A. 2-19)² are reported at 150 NLRB No. 37. This Court has jurisdiction under Section 10(e) and (f) of the Act.

I. The Board's Findings of Fact

Briefly, the Board found that petitioners violated Section 8(b)(4)(i)(ii)(B) by inducing and encouraging individuals employed by B.B. McCormick and Sons, Inc., Houldaille-Duval Company, Blount Brothers Corporation and others to engage in a strike or a refusal in the course of their employment to perform services, and by threatening, coercing, or restraining persons engaged in commerce, with an object of forcing or requiring the above-mentioned companies and other persons to cease doing business with NASA,

Workers International Association, AFL-CIO ("Sheet Metal Workers"); International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO ("Boilermakers"); System Division No. 87, The Order of Railroad Telegraphers ("Telegraphers"); and Brotherhood of Maintenance of Way Employees ("Maintenance of Way Employees"). At times in this brief, IBEW, IAM, Sheet Metal Workers and Boilermakers will be referred to collectively as "the Internationals."

² "J.A." references are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. Occasional "Ex." references are to the original exhibit file lodged with the Court.

Corps of Engineers, and U.S. Air Force, and to force NASA, Corps of Engineers, U.S. Air Force and other persons to cease doing business with Florida East Coast Railway Company.

The Board further found that petitioners IBEW, IAM, Sheet Metal Workers, and Boilermakers were labor organizations within the meaning of the Act and that they and petitioners Telegraphers and Maintenance of Way Employees were engaged in a joint venture so as to make the latter agents of labor organizations within the meaning of Section 8(b) of the Act. The facts upon which the Board's findings rest are contained in a stipulation, which was entered into in lieu of a hearing before and decision of a Trial Examiner. They may be summarized as follows:

A. The composition of petitioners

Petitioners IBEW, IAM, Boilermakers and Sheet Metal Workers are predominantly non-railway labor organizations; they principally represent employees of employers subject to the National Labor Relations Act (herein called "statutory employees") (J.A. 11; 47-48). Each, however, also represents a number of members who work for railroads; the number of such members varies from a low of 4,000 for the Boilermakers to a high of 48,000 for the IAM (J.A. 11; 47-48). The proportion of railroad workers within each of these four Internationals ranges from 21½ percent of 8 percent of the total membership of each union (J.A. 11; 47-48). Both the railroad employees and those employees within the statutory definition of the Act ("statutory employees") vote on and par-

ticipate in all of petitioners' union matters in the same manner (J.A. 11; 47-52).

Petitioners Telegraphers and Maintenance of Way Employees represent only railroad workers (J.A. 16).

B. The Cooperating Organizations extend picketing to the Cape Kennedy-MILA area

The secondary picketing here involved grew out of a contract dispute between the Florida East Coast Railway (hereinafter "FEC") and those unions, including all the petitioners, which represent its non-operating employees. In connection with the 1961 contract reopening, these unions formed a single organization, called the Cooperating Organizations, for the purpose of presenting unified bargaining demands upon the FEC and other railroads (J.A. 5; 31). Thus, each member union of the Cooperating Organizations served identical contract demands upon the railroads (J.A. 5; 31). By June 5, 1962, all the railroads in FEC's classification, except FEC, had agreed to the terms of a new national contract (J.A. 5; 33). FEC, however, had refused to participate in national negotiations, and now refused to be bound by the terms of the national agreement (J.A. 6; 33). Separate negotiations were unsuccessful (J.A. 6; 33-36).

On January 23, 1963, the Cooperating Organizations called a strike against the FEC (J.A. 6; 36-37). Each of the Cooperating Organizations participated in the strike and each furnished personnel to carry on the picketing (J.A. 14; 37). The Cooperating Organizations set up a "master strike team" to direct and coordinate all strike action (J.A. 14; 37). The

master strike team in turn set up local strike teams at various geographic areas to arrange for picketing and other strike action in these local areas (J.A. 14; 37). The master strike team at all times material herein had final authority and control over, and was kept fully advised of the picketing, including the picketing of the Merritt Island Launch Area (MILA) and Cape Kennedy discussed below (J.A. 15; 65).

On September 11 and 12, 1963, the picketing was extended to the Cape Kennedy-MILA area (J.A. 6; 57). The FEC's main track is on the mainland of Florida and is thus separated from the Cape Kennedy-MILA area by the Indian River.³ The main spur of the FEC runs east-west ending at Wilson which is about half-way across the peninsular area on which the Cape Kennedy-MILA complex is situated. At Wilson, two spurs run off the main spur, the west spur to MILA and the east spur to Cape Kennedy. The September 11-12 picketing occurred at two points in the MILA area. Point I was south of Wilson where a siding spur leaves the west spur (J.A. 6; 60). Point II was about 9 miles further south on Route A1A. Picket signs at Point I were adjacent to the spur line and hence visible to trainmen and maintenance men on FEC's west spur (J.A. 60). However, pickets at Point II cannot be seen from either the tracks or the spur line (J.A. 60). As a result of this extension

³ The general geography of the area as well as the points at which picketing took place may be observed with the aid of the map at J.A. 23. Points where picketing occurred are indicated on the map by Roman numerals and will be referred to in this manner as they become relevant.

of the picketing, employees of various contractors performing building and construction work pursuant to contracts with the United States Army Corps of Engineers, refused to cross the picket lines and perform work for their employers at Merritt Island (J.A. 58).⁴

C. Second picketing episode

On February 9, 1964, NASA announced that the FEC had been invested with authority to operate the newly constructed west spur, such operation to begin on the following day. On February 10 and 11, picketing was resumed at location II and additional pickets were placed at points IIA, III, IV, V, and VI (J.A. 7; 58, 23).

Point IIA is 2 miles south of II and is opposite a dirt road leading to a construction project where employees of J.S. Martin Construction Company were working. Martin's contract with the Corps of Engineers had no relation to the FEC spur lines (J.A. 59). Pickets were initially placed at Point II, but upon observing employees of Martin working south of the picketing, the pickets moved to IIA. Martin's employees refused to work during the picketing at IIA (J.A. 59). Thereafter, there was no picketing at II but only at IIA (J.A. 59). Of the six locations picketed on February 10 and 11, pickets were visible from FEC property only at Point IV (J.A. 8; 60). FEC employees did not work at or in the vicinity of the

⁴ The instant unfair labor practice charges were filed by several of these contractors sometime after the commencement of picketing on September 11, 1963.

pickets located at the other five locations picketed (J.A. 8; 60).

All persons entering Cape Kennedy and MILA on February 10 and 11 had to pass a picket (J.A. 61). During the periods of picketing, employees doing work unrelated to the construction or maintenance of the FEC spurs refused to cross the picket lines (J.A. 61). Many of these employees are members of non-railroad locals affiliated with two of the petitioner Internationals. Thus, the employees of Bucon, Inc., Franchi Construction Co., Radio Corporation of America, and Continental Consolidated Corp., who were members of non-railroad locals affiliated with petitioner IBEW, refused to work (J.A. 61). Also, some of the employees of General Dynamics Astronautics who are members of lodges affiliated with petitioner IAM refused to pass a picket (J.A. 61-62).

The picket signs carried during both the September and February picketing read as follows (J.A. 7; Ex. 41):

NOTICE TO THE PUBLIC
F.E.C.R.R. WHOSE
FACILITIES ARE TRANSPORTING
TO THIS PROJECT REFUSED TO
BARGAIN IN GOOD FAITH.
SYSTEM DIVISION NO. 87,
ORDER OF RAILROAD TELEGRAPHERS.
WE HAVE NO QUARREL WITH ANY
OTHER EMPLOYER.

The picketing continued until the morning of February 12, 1964, when it was halted by reason of a temporary restraining order issued by the United States District Court for the Middle District of Florida, Orlando Division, upon application for an injunction

pursuant to Section 10(1) of the Act by the Board's Regional Director (J.A. 7; 62).

D. The third picketing episode

On June 8-10, 1964, picketing was resumed at Points II, IIA, III, V, and VI until enjoined by the District Court (J.A. 8; 66). Point IV was the only location picketed in February which was not picketed in June (J.A. 64). Thus, none of the pickets in June were visible from FEC property (J.A. 60). The pickets carried the same signs as those used in September and February except that the reference to petitioner Maintenance of Way Employees, Locals 2020 and 717, was physically superimposed over the name of petitioner Telegraphers (J.A. 8; 65).⁵

Once again all persons entering the Cape Kennedy-MILA complex had to pass a picket (J.A. 8; 65-66, 61). As a result, employees working for neutral contractors, among them employees of the Charging Parties, refused to cross the picket lines to perform services for their respective employers (J.A. 9; 65-66).

II. The Board's Conclusion and Order

On these facts, the Board concluded that petitioners violated Section 8(b)(4)(i)(ii)(B) of the Act by inducing and encouraging employees of neutral employers to engage in a strike or refusal to work and by threatening, coercing, or restraining persons en-

⁵ On June 8, the earlier picket sign was used at Point II (J.A. 8; n. 3; 64).

gaged in commerce with an object of forcing the above-mentioned neutrals to cease doing business with NASA, Corps of Engineers and U.S. Air Force, and to force these latter Government agencies to cease doing business with FEC.

The Board further found that petitioners IBEW, IAM, Sheet Metal Workers, and Boilermakers were labor organizations as defined by the Act and that they and petitioners Telegraphers and Maintenance of Way Employees were engaged in a joint venture, thus constituting the latter two petitioners as agents of labor organizations within the meaning of Section 8 (b) of the Act.

The Board ordered petitioners to cease and desist from the unfair labor practices found and to post appropriate notices (J.A. 18).

SUMMARY OF ARGUMENT

I. It is undisputed that statutory employees comprise the overwhelming majority of the membership of the International petitioners. Furthermore, they participate in these Unions to the same extent as any of their fellow members. Thus, the sole requirement of Section 2(5), that there be "substantial and meaningful participation of employees," *International Organization of Masters, Mates & Pilots v. N.L.R.B.*, 48 LRRM 2624, 2625 (C.A.D.C.), is clearly satisfied. Nothing in the words of the Act, its structure, or the legislative history supports petitioners' contention that a labor organization is not a labor organization when it acts on behalf of certain of its members (here railroad employees) who are not statutory em-

ployees. The applicable case law is in direct conflict with such an assertion. *National Marine Engineers Beneficial Ass'n v. N.L.R.B.*, 274 F. 2d 167, 173 (C.A. 2).

Nothing in the Board's analysis contravenes the Congressional judgment that disputes between a railroad and its employees are not to come before the Board. The provisions of this Act which deal with primary relationships apply only to "employees" and "employers"; and, as those terms are defined in the statute, railroad employers and their employees are excluded from the Act's coverage. However, the secondary boycott provisions which come into play when a primary dispute is extended to neutral secondary persons, make no reference to "employees" and "employers." Rather, they prohibit the forcing or requiring of any "person" to cease doing business with any other "person." By the use of this broader term, Congress made clear its understanding that neutrals are harmed whenever secondary activity is directed at them—the harm being no less when the primary employer is one whose primary relationship with his employees is not subject to Board regulation. Thus, the result here reached, subjecting labor organizations only to the secondary boycott provisions when they act in behalf of their nonstatutory-employee members, is consonant with the dual Congressional objectives of maintaining the separate treatment of employer-employee relationships of railroads subject to the Railway Labor Act while safeguarding the interests of neutrals who are wholly unconcerned with the primary disputes of others.

II. Petitioners Maintenance of Way Employees and Telegraphers are not themselves "labor organizations" within the meaning of Section 2(5) of the Act, as no statutory employees participate in their affairs. However, as the strictures of Section 8(b) apply to "a labor organization and its agents," these petitioners were properly included in the Board's order. The record in this case clearly discloses that the decision to extend picketing to the Cape Kennedy-MILA area was a decision jointly reached by all petitioners in support of common objectives. In other words, the illegal picketing was part and parcel of a joint venture. Each participant in a joint venture is "principal for himself and agent for his associates" 48 C.J.S. 827. Accordingly, the Telegraphers and Maintenance of Way Employees, under whose name the illegal picketing was conducted, were agents of labor organizations properly subject to the restraints imposed by the Act.

III. Petitioners' extension of the picketing to the Cape Kennedy-MILA area was a clear violation of the secondary boycott provisions of the Act, since it was demonstrably aimed at employers who were wholly unconcerned with the FEC contract dispute. In determining whether picketing at a common situs is undertaken with this illegal motive, the amount of care taken to avoid the needless involvement of neutral employers is a crucial factor.

In the case at bar, the picketing was not limited to those areas where employees of the primary employer, FEC, were located. Indeed, the overwhelming majority of locations picketed were not visible from

FEC property. Rather, petitioners were careful to place the pickets so that all persons entering the Cape Kennedy-MILA area had to pass a picket.

As a result of this unrestricted picketing, employees of contractors doing work at Cape Kennedy-MILA ceased work. Not all of these subcontractors were performing work related to the construction of FEC spurs. Indeed, when petitioners' pickets observed employees of a contractor (J. S. Martin Construction Company) doing such unrelated work, they moved the location of their picketing so as to be closer to that worksite. The contractor whose business was thereupon disrupted had a contract with the Corps of Engineers and the conclusion is inescapable that by changing the location of the pickets in the manner described, petitioners sought to bring about the cessation of business between the contractor and the Corps of Engineers and thereby to force the latter to cease doing business with the FEC.

Petitioners contend that FEC supervisors had such a high degree of control over the employees of the secondary employers that the FEC was the real employer of the people who "nominally" (pet. br. p. 28) worked for the contractors. As petitioners raise this contention for the first time in this Court, Section 10(e) precludes judicial consideration of it. The "salutary policy," *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 256, underlying Section 10(e) is one of affording the Board an opportunity to consider all contentions before its order is subjected to judicial review. Obviously, when contentions are raised for the first time before the reviewing court, the Board has

no such opportunity. Clearly, the considerations underlying Section 10(e) are as applicable where, as here, the parties stipulate as to the facts and waive hearing before a Board Trial Examiner. Petitioners had ample opportunity to make all arguments they thought relevant. In the brief which they submitted to the Board, they made several arguments as to the legality of the picketing which they have since seen fit to abandon, but they did not raise the contention which they urge here. No justification appears for this attempt to circumvent the processes of the Board.

In any event, petitioners' contention is without merit. The mere retention by FEC of the power to prevent the hiring of, or to terminate the employment of, undesirable employees whom the contractor might employ on an FEC project, is hardly a sufficient ground upon which to predicate the removal of the protection of the secondary boycott provisions with respect to those contractors. In all other respects, the contractors remained independent. Furthermore, assuming, *arguendo*, the validity of petitioners' claim with respect to those contractors doing work related to FEC projects, the conduct of the pickets in bringing about a work stoppage by the employees of a contractor doing work wholly unrelated to FEC remains totally unexplained and unjustified.

In sum, the clear intent of petitioners to put pressure on employers who "were neutral, both in terms of their interest in and of their capacity to satisfy" the bargaining demands made on FEC (*National Maritime Union v. N.L.R.B.*, — App. D.C. —,

— F. 2d —, 58 LRRM 2827, 2833), conclusively establishes the illegality of the picketing.

ARGUMENT

Section 8(b)(4)(i) and (ii)(B) of the Act provides, in relevant part, that:

8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, * * *

The principal issue in this case is petitioners' contention that the four Internationals are not "labor organizations" within the meaning of Section 2(5) of the Act and, accordingly, that their conduct, even if it otherwise falls within the prohibition of the above provisions of the Act, cannot be reached under the

Act. We show first that petitioner Internationals are labor organizations within the meaning of Section 2(5) of the Act. Secondly, we shall demonstrate that petitioners Telegraphers and Maintenance of Way Employees participated in a joint venture with the above Internationals and are, therefore, agents of labor organizations subject to the strictures of the Act. Finally, we shall demonstrate that petitioners' picketing at Cape Kennedy-MILA was violative of Section 8(b)(4)(i) and (ii)(B) of the Act.

I. The Board Properly Found That Petitioners IBEW, IAM, Boilermakers and Sheet Metal Workers are Labor Organizations Within the Meaning of Section 2(5) of the Act

Section 2(5) of the Act defines a "labor organization" as follows:

The term "labor organization" means any organization of any kind . . . *in which employees participate* and which exists in whole or in part for dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. [Emphasis added.]

It cannot be seriously disputed that the four Internationals—IBEW, IAM, Sheet Metal Workers, and Boilermakers—fall squarely within the literal terms of that definition. For the stipulated record demonstrates that statutory employees—that is, employees who work for employers subject to the National Labor Relations Act—comprise from 92 percent to 97½ percent of the total membership of each of these Internationals, and that these employees participate in and

vote on all International matters. And it is too clear to require discussion that these Internationals fulfill the remainder of the statutory definition, as they exist, at least in part, for the purposes of collective bargaining.

Petitioners seek to avoid the application of the Act to them by adding a qualification which is nowhere contained in the statute. According to petitioners, the identity of the employees whose interest a union is promoting in a particular dispute governs the determination of whether the union is a labor organization under the Act. In the context of this case, petitioners argue that since the Internationals engaged in the secondary activity on behalf of railway employees (who, under Section 2(3), are exempt from the coverage of the Act), they are not to be considered labor organizations, whereas if they had engaged in the same conduct on behalf of those of its members who are statutory employees they would admittedly be labor organizations. It is plain that such a reading of the statute has no basis in the words of the Act, its structure, legislative history or purposes.

A. *The structure and relevant legislative history of the Act.—The relationship between the definitional sections of the Act and Section 8(b)*

Petitioners correctly point out (br. pp. 16-17) that even if the term "labor organization" is construed as the Board urges, the provisions of Section 8(b) other than the secondary boycott provision would still not be applicable to them insofar as their acts relate to the

FEC or the latter's employees. However, this is not because the Board gives two meanings to the term "labor organization." Rather, it is because these other provisions of Section 8(b) refer to a labor organization engaging in conduct which affects "employees" or "employers" as defined by the Act. Railroads and their employees are, however, excluded from the statutory definition of "employer"⁶ and "employee."⁷ Hence, a statutory labor organization does not, for example, violate Section 8(b)(2), even if it were to cause the FEC to discriminate against its employees. Section 8(b)(2) proscribes a labor organization's causing or attempting to cause "an employer" to discriminate against "an employee." Thus, those provisions of Section 8(b) which would otherwise apply to the primary relationship between a railroad employer and its employees, and which might occasion conflict with the Railway Labor Act if applied to labor organizations in their capacity as the representative of railroad employees, are, by virtue of the reference to Sections 2(2) and 2(3), inapplicable to labor organizations when they act in this capacity.

Section 8(b)(4)(i) and (ii)(B) of the Act is not so limited. A labor organization violates these, the

⁶ Section 2(2) provides:

The term "employer" includes any person . . . but shall not include . . . any person subject to the Railway Labor Act . . .

⁷ Section 2(3) provides:

The term "employee" shall include any employee . . . but shall not include . . . any individual employed by an employer subject to the Railway Labor Act . . .

secondary boycott provisions, if it (i) induces or encourages any individual employed by "any person" to strike or refrain from working; or (ii) threatens, restrains, or coerces any person; where, in either case, an object of this conduct is to force or require "any person" to cease doing business with "any other person." A railroad is undeniably a "person" within the meaning of Section 2(1) of the Act. *Local Union No. 25, Teamsters v. New York, N.H. and Hartford Railroad Co.*, 350 U.S. 155, 160. Therefore, a labor organization violates the Act when it engages in picketing which has an object of bringing about a cessation of business between a railroad and someone dealing with it. Cf. *United Steel Workers v. N.L.R.B.*, 376 U.S. 492, 496.

This result is consonant with the purposes underlying the secondary boycott provisions. The Congressional objective was to shield "unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692. As this Court has recently stated, "It is the person 'wholly unconcerned' in the primary dispute that the Act is designed to protect." *National Maritime Union v. N.L.R.B.*, — App. D.C. —, — F. 2d —, 58 LRRM 2827, 2833, n. 13. See also, *Local 1976, Carpenters v. N.L.R.B. (Sand Door)*, 357 U.S. 93, 100; *Local 761, etc. v. N.L.R.B.*, 366 U.S. 667, 672; Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 8, reprinted in *Legislative History of the Labor Management Relations Act, 1947* (G.P.O., 1948), p. 414. Clearly, the neutral employer is harmed whether secondary strike activity

is directed toward forcing him to cease doing business with a railroad or a statutory employer. By the use of the term "person" to describe the employer primarily involved in the labor dispute, as well as the employer entitled to the protection of the secondary boycott provisions, Congress made clear its intention to prohibit secondary boycotts regardless of the identity of either the primary or secondary employers.⁸

In sum, it is the differing evils which Congress sought to prohibit in the substantive provisions of Section 8(b), and not a shifting definition of "labor organization," which makes Section 8(b)(4)(i) and (ii)(B), but not other provisions of Section 8(b), applicable to the International petitioners when they are acting in their capacity as representatives of railroad employees. This analysis makes it clear that nothing in the Board's position is contrary to the intent of Congress that "neither railroads nor their employees may carry their grievances *with one another* to the N.L.R.B. for resolution." *Local Union No. 25, supra*, 350 U.S. at 160. (Emphasis added.) Hence, the legislative history cited by petitioners (br. pp. 12-15),

⁸ There was some dispute under the pre-1959 Act as to whether a railroad was entitled to the protection of the secondary boycott provisions as they then existed (see, e.g., *Superior Derrick Corp. v. N.L.R.B.*, 273 F. 2d 891, 893 (C.A. 5), cert. denied, 364 U.S. 816; *Great Northern Ry. Co. v. N.L.R.B.*, 272 F. 2d 741 (C.A. 9)). However, the 1959 amendments to the Act made it perfectly clear, by the use of the word "person" rather than "employer," that railroads are entitled to protection from unlawful secondary activity. See *United Steel Workers v. N.L.R.B.*, 376 U.S. 492, 496. See also, 105 Cong. Rec. 14347, 16589, 18022 (II Leg. Hist. 1522-1523, 1706-1707, 1712).

which establishes that such was the purpose of the exclusions embodied in Section 2(2) and 2(3), is irrelevant here.

Petitioners' citation of statements on the floor of Congress that railroad labor unions are to be exempt from the coverage of the Act (pet. br. pp. 13-15) merely begs the question. They shed no light on whether unions which represent statutory as well as railroad employees are to be considered railroad labor unions or labor organizations. Similarly, petitioners' reliance on *Local 833, UAW*, 116 NLRB 267 (br. p. 23) is misplaced, as the Board was there addressing its remarks to a union in which "no employees participate." 116 NLRB at 275.⁹

The only reference we have found to unions representing statutory as well as excluded employees (i.e., a "mixed" union) which may be said to have even tangential relevance arose during the debates which preceded the enactment of the Labor Management Reporting and Disclosure Act of 1959. Representative Harris proposed an amendment which would have made this legislation inapplicable to unions representing employees of employers subject to the Railway Labor Act. One of the arguments put forth in opposi-

⁹ In fact, the very language petitioners quote from *Local 833, UAW*, makes this perfectly clear. Thus, the opening sentence of the quotation reads, in full and without asterisks:

"Under Section 2(5) a railroad employees' union is clearly not a labor organization for the purposes of the Act as no employees participate in it." 116 NLRB at 275 (emphasis added).

tion to the amendment was that it might exempt unions which represented both employees subject to the Railway Labor Act and employees subject to the National Labor Relations Act. (II Leg. Hist. at 1678.) The amendment was defeated. II Leg. Hist. 1677-1680 (105 Cong. Rec. 14505-14508, daily reports). ("Leg. Hist." denotes the two-volume work Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O., 1959)).

We have been unable to find, in the legislative history of the 1935 or 1947 legislation, any indication that Congress considered the problem of these "mixed" unions when it enacted the provisions here relevant. Thus, all that can accurately be said about the legislative history is that the only time Congress specifically considered a provision which might have served to exempt "mixed" unions from the coverage of the Act, it voted against the exemption.

B. *The relevant case law*

One of the early cases involving the "labor organization" status of a union was decided by this Court. In *DiGiorgio Fruit Corp. v. N.L.R.B.*, 89 App. D.C. 155, 191 F. 2d 642, cert. denied, 342 U.S. 869, the Board dismissed Section 8(b)(4) charges which had been brought against a local union composed entirely of farmers ("Farm Union"), holding that agricultural laborers, like supervisors and railroad workers, were excluded from the definition of "employee" and, therefore, that organizations of such individuals, although they existed for the purposes of collective bargaining, did not fall within the Section 2(5) defini-

tion of "labor organization." The Court affirmed the Board's dismissal of the complaint against Farm Union, holding that "organizations composed *exclusively* of agricultural workers are not included in the Act." 89 App. D.C. at 161, 191 F. 2d at 648 (emphasis added).¹⁰ The Court also found, however, that the local's parent organization, "the National [Farm Labor] Union is a labor organization within the meaning of the Act; it includes as members workers other than agricultural workers." *Id.* at 647. However, the Court, again affirming the Board, found, on the facts there presented, that the National Union's participation in the conduct alleged to be illegal was insubstantial. It followed that the National Union could not be charged with responsibility and also that the local had not acted as the "agent of a labor organization." Here, the International petitioners, like the National Farm Labor Union in *DiGiorgio*, *supra*, represent both statutory and excluded workers. They are, therefore, "labor organizations." Since there can be no dispute that these Internationals participated directly and actively in the conduct found to be illegal,¹¹ the grounds upon which the complaint was dismissed in *DiGiorgio* are not present here.

¹⁰ The Court pointed out, on the other hand, that the "statute unquestionably protects farmers from secondary boycotts by organizations in which teamsters, etc., not classified as agricultural workers, participate." 89 App. D.C. at 158, 191 F.2d at 645.

¹¹ As the record establishes, the petitioning Internationals do not have affiliated railroad locals. Rather, they represent their railroad employees directly, through the mechanism of having International representatives participate in the R.E.D. and the various System Federations (J.A. 39-45).

As noted above, neither the words of the statute nor its legislative history support petitioners' contention that unions are not labor organizations within the meaning of Section 2(5) "when they are functioning as railway labor unions" (pet. br. p. 17). For it is the "employees'" participation in the union's affairs, and not the fact that these employees do or do not happen to be involved in a particular labor dispute, that determines the character of the union for the purposes of the Act. Thus, in *International Organization of Masters, Mates & Pilots*, 125 NLRB 113, the Board held that the union (MMP) was a labor organization although most of its members were supervisors and it was these supervisory members, and not the employee members, who were involved in the activity found to have violated the Act. The Board held that, as MMP admitted employees to membership and as those employees participated in MMP's affairs, MMP met the requirements of Section 2(5). This Court subsequently remanded the case to the Board to determine how many employees belonged to MMP and how substantially they participated in its affairs. *International Organization of Masters, Mates & Pilots v. N.L.R.B.*, 48 LRRM 2624. In the Court's view, Section 2(5) "requires the substantial and meaningful participation of employees in order to constitute an organization a 'labor organization' within the meaning of that section." 48 LRRM at 2625.¹²

¹² On remand, the Board held that the number of employee members was substantial where they constituted not more than 2-1/2 percent of MMP's total membership; the Board also

In the case at bar, there can be no question but that statutory employees participate in the petitioning Internationals in substantial numbers and proportion. Indeed, they constitute between 92 and 97½ percent of the total membership of each of the Internationals. Similarly, it is undisputed that they participate in the Internationals in a substantial and meaningful manner, for the parties have stipulated that "employees" fully participate in these unions (J.A. 11; 47-52). That is the only requirement found in the statute, and it is the only requirement this Court concerned itself with in *Masters, Mates & Pilots, supra*. Thus, this Court has already rejected the interpretation of Section 2(5) urged by petitioners here.¹³

found that these employees participated in MMP's affairs in a substantial and meaningful manner. 144 NLRB 1172, 1177, amended in a manner not material here, 146 NLRB 116.

¹³ The Supreme Court has so interpreted this Court's action. Thus, in *Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, 184, n. 22, the Supreme Court discussed the state of the law with respect to

"the assumption that the relevant unit in determining what is a 'labor organization' for purposes of Section 8(b) is no more than the group of employees involved in the then-pending dispute. The validity of this very assumption is currently being litigated before the Labor Board and reviewing courts. Far from having been authoritatively accepted, this limited view of the relevant unit has at least twice been expressly rejected. *National Marine Enigneers Beneficial Ass'n v. Labor Board*, 274 F. 2d at 173, enforcing 121 NLRB 208; *International Organization of Masters, Mates & Pilots (Chicago Calumet Stevedoring Co.)*, 125 NLRB, at 131-132, remanded for reconsideration on other grounds, 48 LRRM 2624 (C.A. D.C. Cir. 1960)."

The Second Circuit has similarly rejected this contention. In *National Marine Engineers Beneficial Ass'n, et al. v. N.L.R.B.*, 274 F. 2d 167 (C.A. 2), the issue was whether certain unions, MMP and MEBA, were "labor organizations." As in the case at bar, these unions, both of which were composed of and represented "employees" as well as excluded individuals, had allegedly violated the secondary boycott provision while acting on behalf of those of their members who were not statutory employees. The court stated:

We do not believe the question whether MEBA and MMP are "labor organizations" that may be guilty of unfair labor practices should be decided by looking only at the workers of [the primary employer]. We think that the determination whether a labor union charged with an unfair labor practice under Section 8(b) is a "labor organization" turns on whether "employees participate" in the organization charged and that, if they do, the union is a "labor organization" although all the workers of the particular employer whom it is seeking to represent are "supervisors" and therefore not "employees." [274 F. 2d at 173.] ¹⁴

¹⁴ The Supreme Court has never passed directly on this issue. In *Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, a state court injunction against picketing had been granted. The state court had held that its jurisdiction had not been preempted, on the ground that since no statutory employees were involved in the dispute the unions were not "labor organizations" and hence there was no violation of the National Labor Relations Act. Applying the principles set out in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, the Supreme Court ruled that the

Petitioners, apparently recognizing the import of the case law, seek to distinguish the *Masters, Mates & Pilots* case (and, presumably, the Second Circuit's *MEBA* case as well) on the ground that the employees excluded there were supervisors while the employees here involved are railroad workers (pet. br. p. 22). We submit that this is a distinction without a difference. Concededly, supervisors were excluded from the Act's coverage for different reasons than railroad workers. Nevertheless, both classes of workers are dealt with in the same section of the statute, and in the same manner; indeed, agricultural laborers are similarly excluded from "employee" status, and this Court has recognized that this exclusion is similar to that of railroad workers. *DiGiorgio Fruit Corp. v. N.L.R.B.*, 89 App. D.C. 155, 159, 191 F. 2d 642, 646, cert. denied, 342 U.S. 869.¹⁵ Thus, neither the

unions were *arguably* "labor organizations" and hence the state court should have deferred. Although the case is not dispositive here, the Court did note that:

We see no reason to assume that the task of interpreting and applying the statutory definition of a "labor organization" does not call for the same adjudicatory expertise that the Board must bring to bear when it determines the applicability of Sections 7 and 8 of the Act to substantive conduct. Indeed, analysis of the problem makes clear that the process of defining the term "labor organization" is one which may often require the full range of Board competence. [370 U.S. at 178.]

¹⁵ Section 2(3) provides: "The term 'employee' * * * shall not include any individual employed as an agricultural laborer, * * * or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act * * *."

structure of the Act, its legislative history, nor the case law furnish even the slightest support for petitioners' contention that the definitional sections of the Act were intended to operate differently as between railroad employees and supervisors.

II. The Board Properly Found That Petitioners Telegraphers and Maintenance of Way Employees Participated in a Joint Venture With the Other Named Petitioners and Are, Therefore, Agents of Labor Organizations Within the Meaning of the Act

The statute makes it an unfair labor practice for "a labor organization or its agents" to engage in the conduct proscribed by Section 8(b). Although petitioners Telegraphers and Maintenance of Way Employees are not themselves "labor organizations" (as no statutory employees participate in them), they are liable as agents of labor organizations because of their participation in a joint venture with the International petitioners.

The record in the instant case compels the conclusion that the entire attempt to get the FEC to accede to the contract terms sought was undertaken as a unified joint venture. Each of the petitioners served identical contract demands on the FEC. All petitioners were members of Cooperating Organizations which called and managed the strike against the FEC in their common behalf. This organization set up master and local strike teams and thus had final control of and authority over the picketing, including its extension to the Cape Kennedy-MILA area. Thus, the mere fact that the signs which the pickets carried after the extension of picketing bore the names of either the

Telegraphers or the Maintenance of Way Employees does not mask the fact that all petitioners were acting in concert in furtherance of a common objective.¹⁶

"In respect of their mutual rights and liabilities, each joint adventurer is both principal for himself and agent for his associates, within the scope of the enterprise." 48 C.J.S. 827. See also, *Hitchman Coal and Coke Co. v. B. Mitchell, et al.*, 245 U.S. 229, 249; *Selby-Battersby & Co. v. N.L.R.B.*, 259 F. 2d 151, 155, 157 (C.A. 4), cert. denied, 359 U.S. 952; *U.S. v. Iacullo*, 226 F. 2d 788, 794 (C.A. 7), cert. denied, 350 U.S. 966. So here, under well established principles of agency,¹⁷ this association for "the prosecution of a common plan or enterprise" resulted in each of the petitioners "being constituted the agent of all." *Hitchman, supra*, 245 U.S. at 249.

¹⁶ Prior to the extension of picketing to the Cape Kennedy-MILA area, the signs indicated merely that "nonoperating employees" were on strike (J.A. 15; 38). Evidently, petitioners were less reticent in acknowledging that they were acting in concert when their conduct did not run afoul of the strictures of Section 8(b) (4).

¹⁷ Senator Taft pointed out that Section 2(13) of the Act "restores the law of agency as it has been developed at common law." 93 Cong. Rec. 6859, 2 Leg. Hist. of the LMRA of 1947, 1622. There is, of course, "no reason why a labor union even though not itself a 'labor organization' cannot be held under Section 8(b) if it has acted as an agent of a 'labor organization.'" *National Maritime Engineers Beneficial Assn. v. N.L.R.B.*, 274 F. 2d 167, 170 (C.A. 2). Judge Miller so held in his dissenting opinion in *DiGiorgio Fruit Co. v. N.L.R.B.*, *supra*, 89 App. D.C. at 163, 191 F. 2d at 650, and the majority, while finding no agency in fact, did not disagree with Judge Miller's view of the law.

Indeed, petitioners do not here deny either joint participation or the legal consequences that flow therefrom. Petitioners' sole contention is that other unions also involved in the joint venture are indispensable parties and the failure to name them in the complaint is an obstacle to enforcement. In support of this proposition, petitioners cite cases involving private contract suits (Pet. Br. pp. 25-26). However, the Supreme Court has held that in Board proceedings, which involve the enforcement of public rights, "there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 363. See also, *Radio Officers' Union, etc. v. N.L.R.B.*, 347 U.S. 17, 53-54; *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 155; *N.L.R.B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271. Traditional joinder rules relied upon by petitioners are limited to situations where a judgment or decree would be futile because the legal rights asserted could not be enforced by a decree which would not be binding upon those not named. *National Licorice, supra*, 309 U.S. at 363. Enforcement of the Board's order against petitioners is, of course, totally effective as to petitioners notwithstanding the failure to name all participants in the joint venture.¹⁸

¹⁸ As the Board's order runs only against those unions who are parties to this proceeding, it does not run afoul of the well-settled constitutional principle that no tribunal may adjudicate the rights of parties not brought before it by due process of law. *National Licorice, supra*, 309 U.S. at 362; *Pennoyer v. Neff*, 95 U.S. 714.

III. Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That Petitioners Violated Section 8(b)(4)(i)(ii)(B) of the Act

Section 8(b)(4)(i)(ii)(B) of the Act proscribes, as did the corresponding provision of the 1947 Act, the implication of neutral employers in disputes not their own with an object of forcing the cessation of business relations between the neutral employer and any other person. *N.L.R.B. v. Denver Building & Constr. Trades Council*, 341 U.S. 675, 692; *National Maritime Union v. N.L.R.B.*, — App. D.C. —, — F. 2d —, 58 LRRM 2827, 2832. In the case at bar, petitioners, having a dispute with FEC, picketed at the Cape Kennedy-MILA area, a common work situs, i.e., a situs at which a number of employers, including FEC, were working. With respect to picketing at such a site, the determination of petitioners' motive is important. For if the picketing was aimed only at the primary employer (FEC), it will be regarded as primary and lawful although it may have incidental effects on secondary employers. If, on the other hand, a purposeful effort is made to direct the picketing at the employees of the neutral employers, the picketing is secondary and unlawful. Thus, picketing at a common situs must be conducted "with restraint consistent with the right of neutral employers to remain uninvolved in the dispute." *Retail Fruit & Vegetable Clerks Union v. N.L.R.B.*, 249 F. 2d 591, 599 (C.A. 9).

In *Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, the Board formulated a series of evidentiary guides for ascertaining whether pick-

eting at a common situs has a legitimate primary or an illegal secondary objective. Under these criteria, for common situs picketing to be primary and lawful: (1) it must be strictly limited to times when the situs of the dispute is located at the picketed premises; (2) at the time of the picketing the primary employer is engaged in its normal business at the situs; (3) the picketing is limited to places reasonably close to the situs of the dispute; and (4) the picketing describes clearly that the dispute is with the primary employer. Petitioners' picketing at the Cape Kennedy-MILA complex clearly failed to satisfy these criteria.

As detailed above, pp. 5-8, petitioners extended their picketing activities well beyond FEC's property and tracks, and the object of such picketing could only have been, as the Board found (J.A. 9-10), to embrace the secondary employers in the dispute. Thus, pickets were visible from FEC property at only one of the six locations picketed in February 1964, and at none of the locations picketed in June. Petitioners so placed the pickets that all persons entering Cape Kennedy-MILA during the February and June picketing had to pass a picket. Most clearly indicative of petitioners' illegal secondary object was the conduct of the pickets with respect to the employees of the J. S. Martin Construction Company. Despite the fact that Martin had a contract with the Corps of Engineers which had no relation to the construction of the FEC spur lines, the pickets moved their location when they observed Martin's employees working south of the area at which they had originally been located. There-

upon, Martin's employees ceased work. The conclusion is inescapable that the motive behind this change of location was to bring about the cessation of business between the Corps of Engineers and Martin and thereby to force the Corps of Engineers (with whom FEC had several construction contracts) to cease doing business with the FEC. It is well settled that Section 8(b)(4) applies to "the forced suspension of commercial intercourse between secondary employers and other persons" as well as business relationships between primary and secondary employers. *National Maritime Union v. N.L.R.B.*, *supra*, — App. D.C. —, — F. 2d —, 58 LRRM 2827, 2832, n. 10; *Miami Newspaper Pressmen's Local 46 v. N.L.R.B.*, 116 App. D.C. 192, 197, 322 F. 2d 405, 410; *Local 3, I.B.E.W. v. N.L.R.B.*, 325 F. 2d 561 (C.A. 2).

Before this Court, petitioners do not dispute the above factual and legal conclusions. Instead, their sole defense to the finding of illegal secondary activity is that FEC's supervisors had such a high degree of control over the employees of some of the secondary employers that "the FEC was the actual employer of the people who nominally worked for the subcontractor" (Pet. Br. p. 28). We submit that petitioners are estopped by the provisions of Section 10 (e) of the Act¹⁹ from presenting this argument in

¹⁹ Section 10(e) provides: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

this Court, as they did not raise it before the Board.²⁰ As stated by the Supreme Court, Section 10(e) "gives emphasis to the salutary policy * * * of affording the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field and Company v. N.L.R.B.*, 318 U.S. 253, 256. Accord: *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 350 (argument on propriety of quarterly calculation of backpay due where seasonal business involved held, barred by Section 10(e) because not raised before the Board); *N.L.R.B. v. District 50, UMW*, 355 U.S. 453, 463-464; *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322. As the Board was not afforded an opportunity to pass on this defense, petitioners are precluded from asserting it here.

In any event, petitioners' contention is wholly without merit. The Supreme Court has held that the mere fact that "the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the em-

²⁰ This proceeding arises from a stipulation; there was no hearing and no trial examiner's decision and thus no opportunity for petitioners to file exceptions. Petitioners were, however, afforded an opportunity to file a brief with the Board and they did so, presenting at that time all the contentions they considered relevant. At no time before the Board did petitioners make the argument of the FEC's alleged control over the subcontractors that they are now making in this Court. To the contrary, petitioners argued to the Board only that their picketing met the *Moore Dry Dock* standards because it was sufficiently proximate to the FEC's spur lines in the Cape Kennedy-MILA area and that the picket signs apprised the secondary employees that the dispute was solely with FEC.

ployees of one the employees of the other." *N.L.R.B. v. Denver Building & Constr. Trades Council, et al.*, 341 U.S. 675, 689-690. Accord: *Retail Fruit & Vegetable Clerks Union v. N.L.R.B.*, 249 F. 2d 591, 594-595 (C.A. 9); *Miami Newspaper Pressmen's Local No. 46 v. N.L.R.B.*, 116 App. D.C. 192, 195-196, 322 F. 2d 405, 408-409. And, in fact, the record does not support petitioners' assertions regarding the extent of FEC's control over the employees of the contractors. Thus, with respect to those contractors performing work on FEC spur lines, the record shows that FEC supervisors meet daily with the contractors' supervisors to give them instructions as to what work the contractors should perform that day (J.A. 56, 57); moreover, FEC retains the right, under its contracts with these contractors, to require the termination or to prevent the hiring at the project of "any undesirable employee" (J.A. 57).²¹ But the record further shows that the contractors' employees are paid by the respective contractors for whom they work and are under their, and not FEC's, direct and immediate supervision (J.A. 56-57). We submit, therefore, that petitioners err when they seek to characterize FEC as "the actual employer of the people who nominally worked for the subcontractors" (Pet. Br. p. 28).

²¹ Petitioners' assertion that "The FEC has the power to dictate to the subcontractors not only who would be hired, but also who would be retained" (Br. p. 28), is unsupported on the record. At the very most, FEC has the right to veto the hire of an employee, or to require his termination, if he is "undesirable" (J.A. 57).

The situation here is a far cry from those presented in the *Local 83*, *IBT* and *Building Service* cases cited by petitioners (Br. p. 28).²² In both cases, the issue presented was the independent contractor status of the alleged primary employers. In *Local 83*, the Board found that the alleged primaries were not independent contractors but were merely employees of the secondary employer, in view of the extensive control and supervision that the secondary exercised over them. 133 NLRB at 1145, 1150. And in *Building Service*, this Court held that, in view of the complex interrelationship of Todaro and Terminal and Terminal's "influence on, if not control over, Todaro's labor policy," Terminal was not a neutral and hence not a secondary employer entitled to the protection of Section 8 (b) (4) of the Act. 313 F. 2d at 883. We submit that the record herein discloses no such influence on or control over the contractors' employees and, therefore, that the *Local 83* and *Building Service* cases are inapposite.

In any event, even assuming *arguendo* the validity of petitioners' claims with respect to certain of the contractors, this does not explain the conduct of the pickets in bringing about a work stoppage by the employees of J. S. Martin Construction Company (*supra*, pp. 6, 31-32). For Martin was performing work wholly unrelated to the construction of FEC spurs, and, therefore, the FEC supervisors had absolutely no

²² *Construction, Building Material and Miscellaneous Drivers Local Union No. 83, IBT*, 133 NLRB 1144; *Building Service Employees v. N.L.R.B.*, — App. D.C. —, 313 F. 2d 880.

contact with Martin's employees. Nevertheless, no steps were taken to insulate Martin's employees from the picketing; to the contrary, petitioners went out of their way to embroil Martin in the dispute.²³ Thus, petitioners cannot now successfully claim that their picketing was only intended to induce employees of primary employers to cease work.

The primary dispute herein concerned the refusal of FEC to acquiesce in the contract terms sought by petitioners for the FEC employees. The contractors working at the Cape Kennedy-MILA complex were "wholly outside the orbit of this conflict" (*National Maritime Union v. N.L.R.B.*, *supra*, 58 LRRM at 2833) and thus were, as are neutral employers in any "typical secondary boycott situation, powerless to end the dispute except by breaking off business relations with" FEC (*Local 636, Plumbers v. N.L.R.B.*, 108 App. D.C. 24, 30, 278 F. 2d 858, 864). In these circumstances, these contractors are persons wholly unconcerned with the primary dispute and are manifestly entitled to the protection of the secondary boycott provisions of the Act. *National Maritime Union*, *supra*, 58 LRRM at 2833, n. 13, and cases there cited.

²³ *Truck Drivers & Helpers, Local 728, etc. v. N.L.R.B. (Campbell Coal)*, 101 App. D.C. 420, 249 F. 2d 512, cert. denied, 355 U.S. 958; *General Truck Drivers, Local 270, etc. (Diaz Drayage) v. N.L.R.B.*, 102 App. D.C. 238, 252 F. 2d 619, cert. denied, 356 U.S. 931; *Local 636, Plumbers, etc. v. N.L.R.B.*, 108 App. D.C. 24, 278 F. 2d 858; *Superior Derrick Corp. v. N.L.R.B.*, 273 F. 2d 891, 895 (C.A. 5), cert. denied, 364 U.S. 816; *N.L.R.B. v. Laundry, Linen Supply & Dry Cleaning Drivers, Local 928 (Southern Service)*, 262 F. 2d 617 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for review should be denied and that a decree should issue enforcing the Board's order in full.

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May 1965.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 19, 084

FILED

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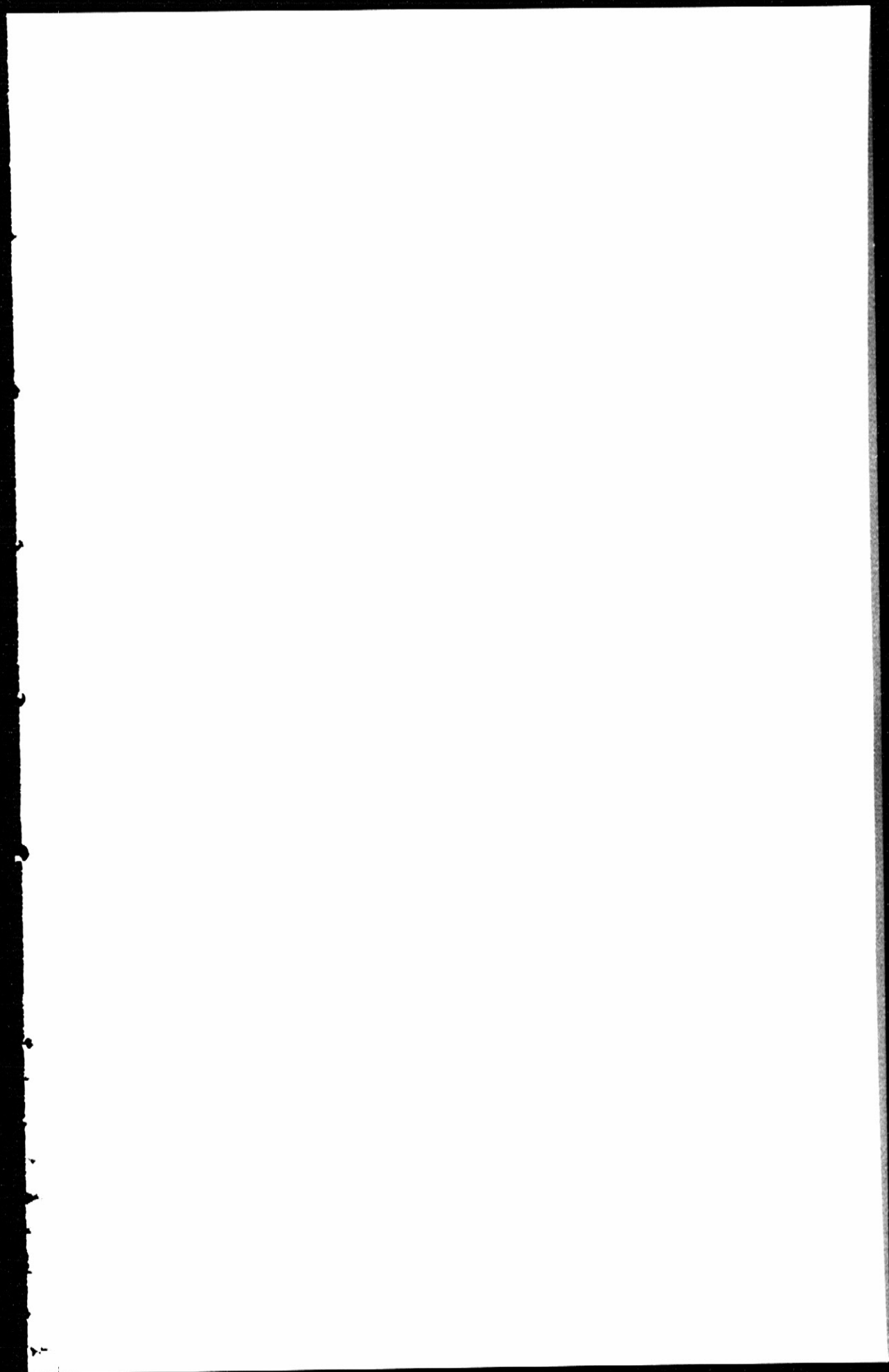
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, et al, Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

PETITION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19, 084

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO; and their agents SYSTEM DIVISION NO. 87, THE ORDER OF RAILROAD TELEGRAPHERS and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

PETITION FOR REHEARING EN BANC

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

Pursuant to Rule 26 of this Court and 28 U.S.C. Section 46(c) the Petitioners respectfully petition the Court for an *en banc* rehearing of this cause decided on July 16, 1965 enforcing an order of the National Labor Relations Board, and in support of this petition the Court is shown as follows:

I

The Court has been granted discretionary power to order rehearings *en banc*. *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U. S. 247, 259. See also: *Shenker v. Baltimore and Ohio Railroad Company*, 374 U. S. 1. The Court should convene *en banc* "when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign S. S. Corp.*, 363 U. S. 685, 689.

(2)

II

The question of whether the Petitioners (Internationals) are "labor organizations" within Section 2(5) of the National Labor Relations Act, as amended, 29 U. S. C. Section 151, *et seq.*, (hereinafter referred to as the Act) when they are engaged in a dispute wholly subject to and regulated by the Railway Labor Act, 45 U. S. C. Section 151 *et seq.*, is of first impression and of critical importance in the proper administration of each of the statutes. Reliance in the *per curiam* opinion upon the Court's decision in **International Organization of Masters, Mates and Pilots of America, Inc., et al. v. NLRB**, No. 15537, is misplaced since, as is noted in Chief Judge Bazelon's dissenting opinion, that case "does not threaten interference with a congressional allocation of regulatory responsibility." (Slip op., p. 3).

III

The instant holding is in conflict with the decision of this Court in **Di Giorgio Fruit Corp. v. NLRB**, 89 App. D. C. 155, 191 F. 2d 642, certiorari denied 342 U. S. 869. In **Di Giorgio**, the Court, adopting the reasoning of the Board, concluded that the Act in its several parts must be construed in a manner that is consistent with statutory harmony. In the context of this case, however, only a part of Section 8(b)(4) of the Act is rendered applicable. Thus, not only are the definitions, and their purpose, contained in Section 2(2) and 2(3) of the Act obliterated, but in addition the comprehensive function of the statute is now fragmentized.

IV

The *per curiam* decision erroneously holds that the mere presence of the four Internationals within the composition of the eleven disputing unions permits barring the other seven

(3)

unions, conceded not to be "labor organizations" within the Act's definition, from invoking traditional economic weapons which have not been denied them by Congress. Such holding is in conflict with the decision of the Supreme Court in *General Committee v. M-K-T. R. Co.*, 320 U. S. 323. In sum, the *per curiam* decision improperly extends the regulatory power of the National Labor Relations Board and permits it to impose restrictions upon a form of railway union conduct not interdicted by the Railway Labor Act.

V

The decision of the Court, sanctioning an incursion by the National Labor Relations Board into an area subject to exclusive regulation under the Railway Labor Act, is offensive to the separation of powers described in Articles I and II of the Constitution.

CONCLUSION

It is respectfully suggested that the instant decision of a division of this Court presents questions which are paramount to the immediate dispute and the challenged conduct thus warranting full consideration by the Court *en banc*.

Richard H. Frank
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(4)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing Petition for Rehearing En Banc was mailed by first class mail to Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, Washington, D. C. this 26th day of July, 1965.

Richard H. Frank
Attorney for Petitioners

(5)

CERTIFICATE

I HEREBY CERTIFY that the foregoing Petition for Rehearing En Banc is presented in good faith and not for the purpose of delay.

Richard H. Frank
Attorney for Petitioners